Petition

81-1181

Office - Supreme Court, U.S.
FILED
DEC 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 23, 1981

QUESTION PRESENTED

Where a federal worker is killed due to active negligence of the United States, is a party secondarily liable for his death precluded from recovering indemnity from the United States by the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c)?*

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* The only parties to the proceeding in the Court of Appeals were Lockheed Aircraft Corporation and the United States. This action was brought in the United States District Court for the District of Columbia by Vincent C. Thomas, Jr., as administrator of the estate of Ann Nash Bottorff, individually and on behalf of all others similarly situated, against Lockheed Aircraft Corporation. Lockheed impleaded the United States as a third-party defendant. After class action certification was denied by the District Court, Lockheed settled plaintiff's claim, so that plaintiff was no longer party to the action, although named in the captions of the decisions of the District Court and the Court of Appeals.

In 1977 the name of Lockheed Aircraft Corporation was changed to Lockheed Corporation. It has no parent company and no subsidiaries which are not wholly owned.

Lockheed's affiliates are: Arizona Fueling Facilities Corporation, Alaska State Fueling Facilities Corporation, CTL Corporation, Honolulu Fueling Facilities Corporation, Letlock Saudi Arabia Co. Ltd., Ocean Minerals, Inc., Oklahoma Fueling Facilities Corporation, Panel Lock Homes (Phil.). Inc., Reno Fueling Facilities Corporation, San Francisco Fueling Facilities Corporation, Transnational Housing Company, and Utah Fueling Facilities Corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported, is unofficially reported at 16 Avi. Cases 17,849 (1981), and is set forth as Appendix A (1a) to this Petition. The opinion and order of the District Court from which appeal was taken are unreported and appear as Appendix B (9a). Two prior related decisions of the District Court, the first of which is reported at 476 F. Supp. 521, are set forth as Appendix C (11a). The judgment of the Court of Appeals sought to be reviewed appears as Appendix D (33a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily involves the interpretation of a provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c). Lockheed's third-party complaint against the United

States was brought in the District Court pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b). These statutory provisions are set forth in Appendix E (35a).

STATEMENT

On April 4, 1975, a C-5A military airlift aircraft took off from Saigon, Vietnam carrying Vietnamese orphans and numerous adults who were being evacuated in the final days of the Vietnam War (C.A.J.A. 199).[1] Shortly after takeoff the pilot was forced to make a crash landing and at least 144 of the approximately 320 persons on board were killed (C.A.J.A. 201). The plane was manufactured by petitioner Lockheed Aircraft Corporation and was owned, maintained and operated by respondent United States (C.A.J.A. 192-93, 195). Among the victims of the crash was Ann Nash Bottorff, a civilian employee of the United States (C.A.J.A. 204).

The Government paid death benefits to Ms. Bottorff's survivors, as provided by the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq.* (C.A.J.A. 205). In addition, the administrator of her estate, Vincent C Thomas, Jr., filed a diversity suit in District Court against Lockheed seeking damages for her wrongful death and for injuries she suffered prior to her death (C.A.J.A. 9).[2] On January 9, 1976, Lockheed impleaded the United States as a third-party defendant, seeking indemnity or contribution under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and on other grounds (C.A.J.A. 32).[3]

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[1] The joint appendix in the Court of Appeals is referred to herein as "C.A.J.A."

[2] This case was consolidated with related cases brought against Lockheed by or for more than 200 decedents and survivors of the crash, including civilian employees of the United States, military employees, nongovernment volunteers, Vietnamese orphans and foreign nationals. By agreement of the parties, the ruling in this case will govern Lockheed's indemnity claims respecting civilian government employees.

[3] Thereafter, the Government and Lockheed entered into two agreements which were filed in the District Court under seal pursuant to a protective order. These agreements relate primarily to certain settlement matters as well as to the effect that the decision in this case is to have on related cases arising out of the Saigon crash.

During the next few years Lockheed settled most of the wrongful death claims filed against it on behalf of civilian government employees, including the claim on behalf of Ms. Bottorff's estate. In the third-party litigation between Lockheed and the United States, the Government advised the District Court on October 5, 1979, that based on "extensive depositions of government and Lockheed witnesses and review of many thousands of documents," it would not contest the sufficiency of the facts underpinning Lockheed's claim for indemnity but rather would only reserve certain legal defenses to Lockheed's claim (C.A.J.A. 136). In related litigation concerning the claims of orphans allegedly injured by the crash landing, the United States also agreed "not to contest its liability to Lockheed for indemnity or contribution for any such compensatory damages" paid to surviving infants.[4]

1. *Uncontested Facts Supporting Lockheed's Motion for Summary Judgment Against the United States.* On November 19, 1979, Lockheed moved for summary judgment on its indemnity claim on the ground that the uncontested facts demonstrate "the active and primary negligence of the United States" (C.A.J.A. 139, 161); the Government simultaneously moved to dismiss Lockheed's claim for tort indemnity on the ground that it is barred by the exclusive liability provision of FECA, 5 U.S.C. § 8116(c) (C.A.J.A. 206, 209); and on the same date these parties filed a joint statement of material facts not in dispute (C.A.J.A. 192).[5]

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[4] This stipulation of September 14, 1979, is filed in *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, Civ. No. 76-0544 (D.D.C.). The cases governed by this stipulation are being tried seriatim in the District Court on the issues of proximate cause and damages.

[5] There are uncontested facts in addition to those set forth in the joint statement of material facts not in dispute. After discovery had been completed in this case, the District Court ordered the parties to file pretrial briefs setting forth, *inter alia*, a detailed "statement of all facts proposed to be proven." Facts not denied by the responding party were to be deemed uncontroverted. (C.A.J.A. 62-65, 133.) On September 25, 1979, Lockheed filed its pretrial brief setting forth the facts it intended to prove at trial. (C.A.J.A. 84.) The Government responded on October 5, 1979, that it would not contest the facts presented by Lockheed to establish liability. (C.A.J.A. 136.)

Among the salient and uncontested material facts demonstrating the United States' active and primary negligence are the following:

(1) The C-5A aircraft was specially built for the Air Force, and the aft cargo door system and the hydraulic and flight control systems were built to the "design-to" specifications of the Air Force (C.A.J.A. 92, 146, 193-94). The Air Force participated in and supervised the testing of the C-5A (C.A.J.A. 89).

(2) Shortly before the accident the tie rods in the aft ramp locking system of the aircraft had been cannibalized by Air Force personnel for use on another C-5A and improperly replaced by other tie rods (C.A.J.A. 101-02, 198-99), in violation of Air Force regulations (C.A.J.A. 110). Had the regulations been complied with, the tie rods would not have been removed and replaced, misrigging would not have occurred, and the accident would not have happened (C.A.J.A. 110).

(3) During the last maintenance work performed on the aircraft, Air Force personnel failed to properly rig the aft ramp locking system (C.A.J.A. 104, 195), in violation of Air Force regulations concerning maintenance procedures (C.A.J.A. 199, 202). Had these regulations been followed, the aft ramp locking system would have been properly rigged, and the accident would have been avoided (C.A.J.A. 109).

(4) Prior to the accident Lockheed proposed that the Air Force implement a special training program on rigging to correct a high degree of misrigging and cannibalization in C-5A maintenance. The Air Force rejected this proposal (C.A.J.A. 96-97, 196-97).

(5) The Air Force failed to advise Lockheed of previous failures of cargo doors due to misrigging of tie rods (C.A.J.A. 111-13, 203).

(6) Although palletized passenger seating for the lower cargo compartment of the C-5A was available, and

could have been installed, it was not installed. As a consequence, the passengers in the lower cargo compartment were not restrained on seats by seatbelts but rather were seated on the floor of the cargo deck on blankets and pillows and strapped down with cargo straps (C.A.J.A. 200).

(7) Shortly after takeoff and before the accident on April 5, 1975, the aircraft's aft cargo door unlocked due to misrigging, causing the door and the aft ramp to separate from the aircraft. Hydraulic lines and control cables running to the tail were severed (C.A.J.A. 200). The pilot attempted to return to the Saigon airport but crash landed in a rice paddy several miles short of the Saigon airport runway (C.A.J.A. 154).

(8) Of approximately 151 passengers and crew members in the cargo compartment, only 8 survived (C.A.J.A. 201). In contrast, all but 3 of the approximately 159 passengers and crew in the troop compartment survived (C.A.J.A. 201).

(9) There is no competent evidence that the accident resulted from any structural problem or stress corrosion of any of the component parts of the aft ramp locking system (C.A.J.A. 108, 201).

2. *Decisions Below.* On the undisputed facts presented, the District Court, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), granted Lockheed's motion for summary judgment on its claim for indemnity against the United States (9a). The Court of Appeals reversed, holding that the exclusive liability provision of FECA, 5 U.S.C. § 8116(c), bars Lockheed's claim for indemnity. Relying on its earlier decision in *Murray* v. *United States*, 405 F.2d 1361, 1364 (D.C. Cir. 1968), the Court of Appeals held that FECA bars all claims for indemnity for damages paid to a federal employee or his representative except possibly those resting on an "independent duty" running from the United States to the third-party plaintiff. The Court of Appeals also held that it need not be detained by consideration of this "exception" because the noncontractual

duties allegedly owed Lockheed by the United States[6]—"the duty to use the aircraft in the manner contemplated by both Lockheed and the United States" and "the duty to provide adequate maintenance of the aircraft to prevent accidents of this type from occurring"—were only "derivative tort claims" (6a).[7]

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Sustains a Conflict in the Circuits on an Important Issue of Federal Law Requiring Uniform Treatment

The Court of Appeals' decision sustains a longstanding yet vibrant conflict in the circuits on whether the FECA, 5 U.S.C. § 8116(c), protects the Government against claims of indemnification by private parties when (a) the United States' active negligence is the primary cause of death or injury to a federal worker, but (b) the private party who is only secondarily liable has been required to answer for the wrongful death or injury.[8] This inter-circuit conflict was explicitly discussed by the

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[6] Lockheed initially made a claim for contractual indemnity in the District Court but did not pursue that claim there because of the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, which requires a claim in excess of $10,000, such as Lockheed's, to be pursued in the Court of Claims. Therefore, the only issue presented to the Court of Appeals and to this Court is whether Lockheed's claim for tort indemnity is barred by 5 U.S.C. § 8116(c).

[7] Lockheed had also claimed that the United States had breached its duty "to provide Lockheed with information about incidents involving the safety of the aircraft." One of the incidents involved partial unlocking of an aft cargo door in flight and occurred approximately eight weeks before the accident. (C.A.J.A. 203). The Court of Appeals concluded that the duty to report sounded in contract rather than tort and thus was not properly before the Court (6-7a). See note 6, *supra*.

[8] Prosser states:

> "Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because

(footnote continues)

Commission on Revision of the Federal Court Appellate System in support of its proposal for a National Court of Appeals. In the Commission's view the issue presented here warrants "a nationally binding decision":

> "The issue is whether the exclusive remedy provision of the Federal Employees' Compensation Act bars the claim of a third party under the Federal Tort Claims Act for indemnity or contribution against the Federal Government for damages paid to an injured government employee. Two 1963 decisions of the Supreme Court have given rise to what one court calls 'hopeless conflict' among the lower federal courts. At least four circuits have now held that recovery is precluded; a 1969 Fourth Circuit decision holds otherwise."

Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 227-28 (1975); see *id.* at 283-84.

The current breakdown is as follows: In addition to the District of Columbia Circuit, the Second, Third, Seventh and Ninth Circuits read FECA to bar tort indemnification from the United States for the injury or death of a federal worker.[9] *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 950-56 (2d Cir. 1975) (explicitly holding contribution barred and implicitly barring tort indemnification, but failing to distinguish contribution from tort indemnification); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 884-87 (3d Cir. 1974) (affirming dismissal of a complaint seeking indemnity or contribution from the United

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(footnote continued)

> of a significant difference in the kind or quality of their conduct." W. Prosser, Law of Torts, p. 313 (4th ed. 1971).

This Court's decision in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) established that the Federal Tort Claims Act, 28 U.S.C. § 1346(b), constitutes the Government's consent to be sued for contribution or indemnity.

[9] In our view neither contribution nor indemnification is barred by 5 U.S.C. § 8116(c), but this case only involves the question of indemnification. See generally Note, 6 U. Toledo L. Rev. 273, 288-89 (1974). See also note 10, *infra*.

States pursuant to the Federal Tort Claims Act); *Kudelka* v. *American Hoist & Derrick Co.*, 541 F.2d 651, 658-60 (7th Cir. 1976) (following the Second Circuit's decision in *Galimi*); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 402-04 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (holding that the exclusive remedy provision removes the underlying liability of the Government necessary for indemnity); *Adams* v. *General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976), *cert. denied*, 432 U.S. 905 (1977) (adhering to *United Air Lines*). The First Circuit has held contribution barred by FECA, but has reserved decision on whether indemnification of a person only secondarily liable is precluded. *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 343-47 (1st Cir. 1969). On the other hand, the Fourth Circuit in a well-reasoned opinion has squarely held that the exclusive remedy provision of FECA does not bar the claim of a third party (secondarily liable for injury to a federal employee) from seeking indemnity from the Federal Government for damages paid to the employee. *Wallenius Bremen, G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

The inter-circuit conflict is robust, as well as venerable. Five days after the decision below, the Fourth Circuit declined to reconsider its holding in *Bremen*. In *Glover* v. *Johns-Manville Corp.*, No. 80-1085 (4th Cir. Oct. 5, 1981), several manufacturers of asbestos sought indemnity for damages paid to a federal employee who, after recovering compensation under FECA, had sued the manufacturers in tort. The Fourth Circuit held that the manufacturers were actively negligent as a matter of law and hence under established tort principles were not entitled to indemnification. In reaching the merits of the manufacturers' indemnity claim, that court refused to overrule *Bremen*:

> "The parties have expended a large portion of their arguments on appeal on the question of the propriety of the rule, set forth in *Bremen*, that third parties unrelated to an injured employee are beyond the scope of the FECA exclusivity clause. For the purpose of this opinion, we will assume without deciding that §8116(c) of the FECA is inapplicable

> to this action, and only comment that there is no merit to the United States' contention that *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963) upon which *Bremen* relied, was overruled by *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975)." Slip op. at 7.

A concurring judge objected to the majority's "implied application of the *Bremen* doctrine," stating that he was "troubled by the fact that this Circuit permits a tortfeasor to seek indemnity from the United States" despite FECA and that he would prefer to seek "*en banc* reconsideration of the *Bremen* analysis." Slip op. at 20 (Hall, J. concurring).

The issue presented is of widespread importance; it affects any person dealing with the United States or one of its employees. Whether the interpretation of FECA by the court below is correct or incorrect, the lack of a uniform national rule should not be countenanced by this Court. If, as the court below evidently thought, allowance of claims for indemnity against the United States by persons secondarily liable for a federal employee's death or injury would undermine Congress' intent in enacting the exclusive liability provision of FECA, that policy should be enforced throughout the nation.[10] The present diversity of rulings fails to protect the Government's pocketbook, leads to grossly different treatment of persons secondarily liable for harm to a federal worker, and encourages forum shopping.[11]

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[10] In passing the exclusive liability provision of FECA, Congress did not intend to affect the rights of third parties entitled to indemnity, but only to limit the direct liability of the Government to its employees. See pp. 11-17, *infra.* Moreover, recovery of indemnity by Lockheed would not expose the Government to extravagant or unwarranted liability. In this case the United States' active and primary negligence has caused the death of its employee, while Lockheed was only secondarily liable. It is therefore both reasonable and just that the United States indemnify Lockheed. See note 8, *supra.*

[11] In assessing the likelihood of undesirable forum shopping occasioned by the conflict in the circuits, it should be kept in mind that the provisions of Fed.R.Civ.P.14 authorizing third-party claims are permissive, not mandatory. A party may refrain from impleading a third-party defendant in favor of asserting his claim for indemnity in a separate independent action. See *United*

(footnote continues)

On the other hand, if, as demonstrated below and as this Court recognized in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 601 (1963), Congress did not intend to disturb "the rights of unrelated third parties" when it enacted the exclusivity provision, the troublesome consequences of the misinterpretation adopted below are quite far-reaching and warrant correction by this Court. The interpretation adopted by the court below divorces 5 U.S.C. §8116(c) from its intended purpose—to eliminate the Government's tort liability to its employees and in exchange to afford them assured compensation benefits from the Government without proof of fault. Instead, it imposes an unfair burden on a stranger to the federal workmen's compensation scheme.[12] Moreover, contrary to "[t]he approach of the indemnity cases in this Court"—to place the risk of liability on the person "in the best position to avoid accidents," *Scindia Steam Navigation Co.* v. *De Los Santos*, 49 U.S.L.W. 4405, 4409 (U.S. April 21, 1981)[13]—the decision below prevents a party only secondarily responsible from shifting the risk of liability to the party whose active negligence was primarily responsible for the accident. Thus,

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(footnote continued)

States v. *Yellow Cab Co.*, 340 U.S. 543 (1951). Accordingly, as matters stand in the circuits, a defendant secondarily liable for the injury or death of a federal employee is well-advised, if sued outside the Fourth Circuit, to institute a separate indemnity action in one of the district courts in the Fourth Circuit.

[12] Workmen's compensation statutes expressly precluding third-party claims for indemnity against an employer for injuries to an employee have been declared unconstitutional under the due process and equal protection clauses by two state Supreme Courts. *Carlson* v. *Smogard*, 215 N.W.2d 615 (Minn. 1974); *Sunspan Eng'r & Constr. Co.* v. *Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla. 1975). Moreover, this Court's decisions upholding the constitutionality of state workmen's compensation statutes emphasized that it might well violate due process for a legislature to "set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute." *New York Central R.R.* v. *White*, 243 U.S. 188, 201 (1917); see *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 240-41 (1917). The exclusive liability provision of FECA should be construed to avoid this constitutional infirmity. See, *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

[13] See, *e.g.*, cases cited in note 16, *infra*.

the decision below upsets sound principles of tort law designed to place liability on the person best able to take steps to avoid or minimize the risk of an accident. Furthermore, the decision below sanctions disparate treatment of similarly situated individuals: although other persons secondarily liable in tort may seek indemnity from the primary, active tortfeasor, those who are secondarily liable for injury of a federal worker must bear the entire burden of liability.[14] This disparity is exacerbated by the conflict in the circuits. Finally, the decision below imposes on persons dealing with the Federal Government the risk of extraordinary tort liability for the active, primary negligence of the Government, thereby increasing the cost of doing business with the Government and in turn the Government's own costs. This Court should grant the writ and definitively resolve whether Congress in enacting 5 U.S.C. §8116(c) intended to abrogate sound principles of tort indemnity and to impose such extraordinary risks on persons dealing with the Federal Government.

II. The Court of Appeals' Decision is Contrary to Decisions of this Court and Inconsistent With the Language, History and Policy of the Federal Employees' Compensation Act

In 1949, Congress amended FECA to increase the benefits payable to federal workers and to provide, in new Section 7(b),[15] that the liability of the United States under the Act

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[14] An irony of the decision below is that it discourages settlement of tort claims. In *Murray* v. *United States*, 405 F.2d 1361, 1365-66 (D.C. Cir. 1968), the court below held that a party responsible for injury to a federal employee cannot recover contribution from the United States as a joint tortfeasor, but that any judgment against the private tortfeasor should be "limited to one-half of the amount of damages sustained by plaintiff . . . ." In the present case, the court below noted the existence of the so-called *Murray* credit but declined to decide its continued validity (6a,n.4). Thus, had Lockheed tried plaintiff's suit it would, if *Murray* is still viable, have been entitled to limit its liability to one-half of plaintiff's damages; but since Lockheed settled that claim, with the concurrence of the Government, it must bear the entire burden.

[15] The text of this provision was slightly recast in 1966 when Congress enacted Title 5 into positive law. 80 Stat. 542 (35a). In codifying Title 5, Congress expressly disclaimed any intent to change the substantive meaning

(footnote continues)

> "with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death, in any direct judicial proceedings . . ., whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute."[16] 63 Stat. 861-62 (1949).

(footnote continued)

of this provision. S. Rep. No. 1380, 89th Cong., 2d Sess. 18, 163 (1966); H.R. Rep. No. 901, 89th Cong., 1st Sess. 1, 143 (1965). The original statutory language set forth in the text referred to "any direct judicial proceeding" rather than "a direct judicial proceeding" (35a). The plain language of both versions clearly limits the subsection to "direct" judicial proceedings in contrast to indirect third-party actions such as the case at bar.

[16] This language was patterned after and is nearly identical to Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which provided that

> "[t]he liability of an employer prescribed in section 4 [for compensation] shall be exclusive, and in place of of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." 44 Stat. 1426 (1927).

In *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), this Court held that when a shipowner has paid damages to an injured longshoreman, Section 5 of the LHWCA does not preclude the shipowner from seeking contractual indemnity from the stevedoring contractor who employed the injured longshoreman. After quoting the statutory language set forth above, the Court stated:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone* claiming under or through such employee, *on account of his injury or death arising out of that employment.* In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other hand, the Act prescribes no *quid pro*

(footnote continues)

This Court explored the meaning of Section 7(b) in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963). The *Weyerhaeuser* case arose out of a collision between an Army dredge and a privately-owned vessel. A civilian federal employee aboard the dredge sustained personal injuries in the collison, collected compensation under FECA, and then sued the owner of the private vessel, Weyerhaeuser, for damages. Weyerhaeuser settled the employee's suit for $16,000. *Id.* at 598. Meanwhile, Weyerhaeuser sued the United States for the damages it sustained in the collision, and the United States filed a cross-libel. The District Court found that the collision had occurred through the mutual fault of both vessels and, applying the admiralty rule of divided damages, held that each party was entitled to recover from the other one-half of its damages. Over the Government's objection that Section 7(b) of FECA barred the award, the District Court allowed Weyerhaeuser to recover one-half of the $16,000 it had paid the injured federal employee. *Id.* at 598-99. The Ninth Circuit reversed. This Court granted certiorari and in a unanimous opinion held that Section 7(b) did not preclude

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(footnote continued)

> *quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages." 350 U.S. at 129 (emphasis in original).

Moreover, the Court found that the shipowner's claim for indemnity arose from the stevedore's obligation to load the cargo properly and accordingly was "not an action by or on behalf of an employee" and "not one to recover damages 'on account of' an employee's 'injury or death.'" *Id.* at 130.

In sum, a shipowner's claim to recover damages paid an injured longshoreman from the longshoreman's employer was consistent with both the purpose and language of the exclusive liability provision of the LHWCA. See also *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

In the 1972 amendments to the LHWCA, Congress abolished the longshoreman's right to recover damages from the vessel owner for unseaworthiness, preserved his right to recover for negligence on the part of the shipowner, and eliminated the stevedore's obligation to indemnify the shipowner if the latter is found liable to the longshoreman. 33 U.S.C. § 905(b). No similar amendment has been made to FECA.

Weyerhaeuser's claim to be reimbursed for one-half of the amount it had paid the injured federal worker.

This Court first examined the language of Section 7(b). In response to the Government's contention that the plain language of the statute barred the shipowner's claim—"anyone otherwise entitled to recover damages from the United States"—the Court noted:

> "But the general language upon which the Government relies follows explicit enumeration of specific categories: employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain'." *Id.* at 600-01.

Turning to the legislative history, the Court found that Section 7(b) was part of a *quid pro quo* between the Government and its employees and was not intended to affect the rights of unrelated third parties to seek reimbursement from the Government:

> "The legislative history of the Federal Employees' Compensation Act, originally passed in 1916, shows that the concern of Congress was to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States. *The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and

liabilities of private shipowners in collison cases." *Id.* at 601 (emphasis supplied).[17]

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[17] In a footnote to this passage, the Court quoted the Senate Report explaining the addition of Section 7(b):

> "Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.
>
> "Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause *Federal employees* to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits *by employees* against such instrumentalities based upon accidents in employments.
>
> "This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the

(footnote continues)

Accordingly, the Court held that Section 7(b) did not preclude application of the admiralty rule of divided damages to permit Weyerhaeuser to receive reimbursement from the Government for damages paid to an injured federal employee.

The Court of Appeals did not purport to distinguish *Weyerhaeuser*. Decisions on which the court below relied, however, have suggested that *Weyerhaeuser* is "an anomaly, limiting its effect upon the exclusivity provision of FECA to the particular rule of admiralty . . . ." Note, 6 U. Toledo L. Rev. 273, 288 (1974). See, *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 402-03 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). Such a cramped reading of *Weyerhaeuser* is unwarranted. The Court's rationale is not so confined; it rests on (1) its reading of the general phrase "anyone otherwise entitled" in light of the prior enumeration of specific parties claiming through or on behalf of an injured or deceased federal worker,[18] and (2) its understanding that Congress did not intend Section 7(b) to affect the rights of unrelated third parties, but only to regulate the relationship between federal workers and their employer.

(footnote continued)

> standpoint of both *the beneficiaries involved* and the Government." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949), *quoted in* 372 U.S. at 601-02 n.5 (emphasis supplied by the Court).

Section 7(b), as enacted, originated as a Senate substitute for a House-passed provision worded somewhat differently. 95 Cong. Rec. S13606 (daily ed., Sept. 30, 1949). The Senate Report is therefore more authoritative than the earlier House Report, although the latter does not appear to differ significantly in its explanation of the exclusive liability provision. H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949).

[18] Lockheed's claim for indemnity is outside the language of the exclusive liability provision of FECA for another reason as well. As originally enacted, that provision spoke of persons entitled to recover "damages" from the United States "on account of such injury or death." 63 Stat. 861-62. Since codification of Title 5, it speaks of persons entitled to recover "damages" from the United States "because of the injury or death . . . ." 5 U.S.C. §8116(c). Lockheed is entitled to reimbursement, not "damages" from the United States, and its claim is not "on account of" or "because of" the death of Ann Nash Bottorff, but because the United States' active negligence led to the imposition of secondary liability on Lockheed. See generally, *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15

(footnote continues)

Furthermore, this Court has itself rejected such a narrow interpretation of *Weyerhaeuser*. While *Weyerhaeuser* was pending in this Court, certiorari was sought to review the decision of the Third Circuit that Section 7(b) precludes a party who has been held liable for negligence in causing injury to a federal employee from recovering contribution from the Government as a joint tortfeasor. *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962). In opposing certiorari, the United States argued that the grant of certiorari in *Weyerhaeuser* furnished no support for issuing the writ in *Treadwell*, a case not in admiralty, since *Weyerhaeuser* was concerned only with the admiralty rule of divided damages. Brief for the United States in Opposition at 6-9, *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). Nevertheless, this Court granted certiorari, vacated the judgment of the Third Circuit, and remanded the case to the District Court for further consideration in light of *Weyerhaeuser*. *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). On remand, the district court ordered contribution; the United States filed an appeal from that order but later moved for dismissal of the appeal on the recommendation of the Solicitor General. See *Hart* v. *Simons*, 223 F. Supp. 109, 111 n.1 (E.D. Pa. 1963).

In summary, the decision below is irreconcilable with this Court's decision in *Weyerhaeuser*. Ignoring the careful textual and legislative history analysis undertaken by this Court in *Weyerhaeuser*, the Court of Appeals interpreted the exclusive liability provision of FECA as precluding indemnification of, and hence placing extraordinary liability on, strangers to the compensation scheme established by that legislation. This Court should grant certiorari to prevent the undermining of Congressional policy, the erosion of the prior decisions of this Court, and the imposition of exceptional and unjustifiable liability on persons dealing with the Federal Government.

(footnote continued)

N.E.2d 567 (1938); *Oaklawn Jockey Club, Inc.* v. *Pickens-Bond Constr. Co.*, 477 S.W.2d 477 (Ark. 1972); *Miller* v. *DeWitt*, 226 N.E.2d 630 (Ill. 1967). As stated in *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 152, 282 N.E.2d 288, 294 (1972), the employer's active negligence creates "a separable legal entity of rights" independent of the employee's cause of action.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

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December 23, 1981

Appendix

Appendix A

United States Court of Appeals for the District of Columbia Circuit

No. 80-1323

VINCENT C. THOMAS, JR., Administrator
of the Estate of ANN NASH BOTTORFF, Deceased,
Individually and on behalf of
all others similarly situated

v.

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,
Defendant & third-party plaintiff

v.

THE UNITED STATES OF AMERICA,
Third-party defendant, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 75-1831)

Argued June 9, 1981

Decided September 30, 1981

Katherine Gruenheck, Attorney, U. S. Department of Justice, with whom *Alice Daniel,* Assistant Attorney General at the time the brief was filed, *Thomas S. Martin,* Acting Assistant Attorney General, *Charles F. C. Ruff,* United States Attorney, and *William Kanter,* Attorney, U. S. Department of Justice, were on the brief, for appellant. *Eloise E. Davies,* Attorney, U. S. Department of Justice, also entered an appearance for appellant.

Carroll E. Dubuc, with whom *Temple L. Ratcliffe* and *Richard M. Sharp* were on the brief, for appellee Lockheed Aircraft Corporation.

Isaac N. Groner and *Raymond D. Battocchi* entered appearances for appellee Thomas.

Before TAMM, ROBB, and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* In this case the Government appeals from a judgment holding it liable for a claim in contribution or indemnity entered by the United States District Court for the District of Columbia. Believing that the district court erred in failing to find the exclusivity provision of the Federal Employees' Compensation Act a bar to such a claim, we reverse and remand.

I. BACKGROUND

The factual circumstances leading to this litigation are set out in *Schneider v. Lockheed Aircraft Corp.*, No. 80-1844, slip op. at 5-6 (D.C. Cir. June 17, 1981). For present purposes it suffices to note simply that on April 4, 1975, an accident occurred aboard a Lockheed-manufactured C5A aircraft that was being used by the United States to transport approximately 301 passengers, including at least 226 Vietnamese orphans, from Saigon to the United States. The plane crashed, killing approximately 144 persons.

On November 4, 1975, Vincent C. Thomas, Jr., filed a complaint as administrator of the estate of Ann Nash Bottorff, a civilian employee of the Department of the Navy, seeking damages for her wrongful death and for injuries she suffered prior to her death.[1] On January 9,

[1] Thomas also sought damages on behalf of all those similarly situated. The district court denied class action certification.

1976, defendant Lockheed Aircraft Corporation (Lockheed) impleaded the United States as a third-party defendant seeking indemnity or contribution on a variety of tort and contract theories. Counts I and II of Lockheed's third-party complaint assert a right to indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) *et seq.* (1976). Counts III and IV are based upon admiralty law and Count V upon contractual indemnity.[2] After settling the plaintiff's claims against it, Lockheed moved for summary judgment in the third-party action. The Government filed a motion to dismiss. In an order dated December 7, 1979, the district court granted Lockheed's motion for summary judgment, thereby denying by implication the motion to dismiss. *Thomas v. Lockheed Aircraft Corp.*, No. 75-1831 (D.D.C. Dec. 7, 1979), Joint Appendix (J.A.) at 225-26. The court held that indemnity was available to Lockheed and that such a "claim over" was not barred by the Federal Employees' Compensation Act (FECA or the Act), 5 U.S.C. §§ 8101 *et seq.* (1976). The rationale for this decision had been developed in earlier memorandum opinions. *In re Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*, No. 75-0205 (D.D.C. May 19, 1978), J.A. at 48-57; *In re Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*, 476 F. Supp. 521 (D.D.C. 1979), J.A. at 66-78. On January 23, 1980, the district court entered the final judgment from which the Government now appeals.[3]

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[2] The district court did not reach Lockheed's maritime law contentions. Thomas v. Lockheed Aircraft Corp., No. 75-1831 (D.D.C. Dec. 7, 1979), Joint Appendix (J.A.) at 225-26. Furthermore, Lockheed abandoned its claim for contractual indemnity. Brief for Appellee at 1 n.2.

[3] A stipulation filed under seal provided the basis for the trial court's entry of final judgment in this case without a determination of liability and damages. Brief for Appellant at 12 n.46.

II. Discussion

The conflict between doctrines governing third-party suits for contribution or indemnification and statutory exclusive remedy provisions of workmen's compensation laws is "[p]erhaps the most evenly-balanced controversy in all of workmen's compensation law . . . ." Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U. L. Rev. 351, 351 (1970). The policies underlying the two sides of this controversy are simply stated but starkly opposed. On the one hand, the employer, here the federal government, can point to the explicit congressional statement that its liability "with respect to the injury or death of an employee," 5 U.S.C. § 8116(c), is limited to the compensation payments set out in the Act. Assuming arguendo the primary negligence of the Government, however, the third party—here Lockheed—can point to the inequity in subjecting it to a staggering liability that it would not have had to bear "but for the sheer chance that the other parties involved happened to be under a compensation act." 2A A. Larson, Workmen's Compensation Law § 76.10 at 14-288 (1976).

In examining this case, it seems clear that "[w]hen an employee covered by workmen's compensation sues in negligence a third party who then impleads the employer, there is no way fully to satisfy all policies coming into play." *Galimi v. Jetco, Inc.*, 514 F.2d 949, 952 (2d Cir. 1975). We believe that the controversy is no longer a live one, at least as far as FECA is concerned. The pertinent provision in FECA states in part:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, de-

> pendents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

5 U.S.C. § 8116(c) (1976). We believe that the settled rule applicable to the case at hand is that this exclusivity provision serves to bar a third-party claim against the United States with respect to the injury of a government employee that is not based upon an independent duty owed by the Government to the purported indemnitee. *E.g., Galimi v. Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975); *Travelers Insurance Co. v. United States*, 493 F.2d 881 (3d Cir. 1974); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom. United Air Lines v. United States*, 379 U.S. 951 (1964). *Contra, Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). Because these courts have ably analyzed this area of the law, we see nothing to be gained in extended reiteration. *See Kudelka v. American Hoist & Derrick Co.*, 541 F.2d 651, 659 (7th Cir. 1976).

This weighty authority notwithstanding, Lockheed asserts that section 8116(c) of FECA does not bar an action for contribution by a third party against the United States. In *Murray v. United States*, 405 F.2d 1361, 1364 (D.C. Cir. 1968), we explicitly held to the contrary. Noting that no right of contribution exists "unless there is a joint liability of both parties to the injured person," we stated that "the Federal Employees' Compensation Act . . . precludes a tortfeasor held liable to a government employee from suing to obtain contribution from the government." *Id.* Lockheed has not attempted to distinguish this case and we see no reason

to retreat from this aspect of our decision in *Murray*.[4] The *Murray* court left open, however, the question of whether "a claim of non-contract indemnity" would be barred by the exclusivity provision of FECA. *Id.* at 1367. Questioning decisions that assumed that contribution and indemnity claims stood on the same footing, the court left for another day the "difficult question" of whether a claim for noncontractual indemnity resting upon an independent duty running from the third-party defendant, the putative indemnitor, to the third-party plaintiff would also be barred under FECA. *Id.*

Because we find that Lockheed has alleged only derivative tort claims, we need not dwell upon this question. Here Lockheed alleges the breach by the United States of three basic duties owed it: first, the duty to use the aircraft in the manner contemplated by both Lockheed and the United States; second, the duty to provide adequate maintenance of the aircraft to prevent accidents of this type from occurring; third, the duty to provide Lockheed with information about incidents involving the

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[4] Because the issue has not been briefed or argued and is not necessary to our judgment today, we do not decide the continuing validity of what has been termed the "*Murray* credit." In dicta, the *Murray* court sought to mitigate the "inequity residing in the denial of contribution against the employer" by suggesting that the plaintiff in such a situation should be limited to recovery from the defendant of one-half of the amount of damages sustained, if the circumstances "would have entitled the [defendant] to contribution from the employer if [FECA] had not interposed a bar." *Murray*, 405 F.2d at 1365-66. This suggestion has been met with distinguished criticism, *e.g.*, 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.22 at 14-314 through 14-319 (1976), and with less than overwhelming approval from other courts. *E.g.*, Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669, 672 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Turner v. Excavation Constr., Inc., 324 F. Supp. 704 (D.D.C. 1971); Arcell v. Ashland Chem. Co., 152 N.J. Super. 471, 378 A.2d 53 (1977).

safety of the aircraft. The first two of these duties are clearly derivative and based upon the duties owed by the Government to its employees and passengers. Lockheed's third assertion alleges no delictual duty but rather one that sounds in contract. As pointed out above, however, Lockheed did not pursue its claim of contractual indemnity in the district court. *See* note 2, *supra*.

The two cases cited by Lockheed to support its assertion of the above duties as "independent," running from the Government to Lockheed, in fact offer no such support. In *Holden v. Placid Oil Co.*, 473 F. Supp. 1097 (E.D. La. 1979), the court did not find that an independent duty running from the employer to the third party existed. Rather, summary judgment was denied in that case because the facts were not sufficiently developed to determine whether under Louisiana law an independent duty, based upon the employer's position as the *manufacturer* of an allegedly defective product, might exist. *Id.* at 1102. In *Roy v. Star Chopper Co.*, 442 F. Supp. 1010 (D.R.I. 1977), *aff'd*, 584 F.2d 1124 (1st Cir.), *cert. denied*, 440 U.S. 916 (1978), the court expressly found that an exclusivity provision in the Massachusetts Workmen's Compensation Act *barred* indemnity claims against the employer based on any noncontractual relationship. *Id.* at 1018. Under the unusual circumstances of that case, the court found that an implied contract to indemnify existed based largely upon the relationship between the parties "in the nature of co-manufacturers." *Id.* at 1020.

In our examination of the duties alleged by Lockheed to have been owed it by the Government, and on the facts before us, we agree with those courts that have refused to find an independent duty running from the purchaser to the manufacturer to use the product in question in such a way as not to bring liability upon the latter. *See, e.g., Santisteven v. Dow Chemical Co.*, 506 F.2d 1216

(9th Cir. 1974); *Boldman v. Mt. Hood Chemical Corp.*, 288 Or. 121, 602 P.2d 1072 (1979); *Olch v. Pacific Press & Shear Co.*, 19 Wash. App. 89, 573 P.2d 1355 (1978). *But see Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). We believe that this issue is succintly summarized by Professor Larson, who states that

> when the relation between the parties involves no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes, such as indemnity, since what governs is not the delictual or contractual form of the remedy but the question: is the claim "on account of" the injury, or on account of a separate obligation running from the employer to the third party?

2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.44 at 14-405 (1976). Here the claim is clearly "on account of" the fatal injury to the employee. The district court erred in failing to find FECA a bar to Lockheed's claim for contribution or indemnity.[5] The judgment of the district court is therefore reversed and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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[5] Because the parties have debated the availability of relief for Lockheed under maritime principles only in footnotes in their briefs, *see* Brief for Appellant at 17-18 n.50; Brief for Appellee at 37-38 n.23, and because the district court expressly reserved this issue, we do not think that disposition of this question is appropriate at this time. Even if admiralty jurisdiction is appropriate, of course, the district court should examine with care the intersection of such jurisdiction with the exclusivity provision found in FECA. *See generally* Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597 (1963).

Appendix B

United States District Court for the District of Columbia

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiff,

against

LOCKHEED AIRCRAFT CORPORATION,

Defendant and Third-Party Plaintiff,

against

THE UNITED STATES OF AMERICA,

Third-Party Defendant.

Civil Action No. 75-1831

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant, Lockheed Aircraft Corporation (Lockheed) has settled the plaintiff's claim against it and, as Third Party Plaintiff, has filed a motion for summary judgment against the United States, as Third Party Defendant. In discharge of their obligation under Local Rule 1-9h, the parties to this summary judgment motion have filed a Joint Statement of Material Facts As To Which There Is No Genuine Issue (Joint Statement), and it is incorporated here by reference.

The Court has carefully considered the motion, the memoranda in support thereof and in opposition thereto, the Joint Statement and the oral arguments of counsel.

The factual and legal elements of a decision on the pending motion were developed in the Court's Memoranda of May 19, 1978 and April 12, 1978, in No. 75-0205. For reasons

more fully stated in the related context of those Memoranda, the Court concludes that:

> (1) under the governing law of the District of Columbia, which is the forum, indemnity equivalent to that established by the Federal Tort Claims Act and the Federal Common Law is available to Lockheed against the United States. *See Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. den., sub. nom., Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 973 (1975); *Humphries v. Tann*, 13 Avi. 18,229 (E.D. Mich. 1976); *In re Paris Air Crash*, 399 F. Supp. 732 (C.D. Cal. 1975).
>
> (2) This claim over is not barred by the Federal Employees' Compensation Act.
>
> (3) In view of the foregoing, the Court has reached no conclusion with respect to whether jurisdiction exists independently under the Suits In Admiralty Act.

In view of the foregoing, it is the 7th day of December, 1979, hereby

ORDERED and ADJUDGED: That the motion for summary judgment of Lockheed as Third Party Plaintiff against the United States as Third Party Defendant is GRANTED: and it is

FURTHER ORDERED: That the parties shall on or before December 14, 1979, submit a form of judgment, if they can agree upon one, or competing forms, each of which is seen by the other party.

/s/ LOUIS F. OBERDORFER

United States District Judge

Appendix C

United States District Court for the District of Columbia

In Re Air Crash Disaster
Near Saigon, South Vietnam
on April 4, 1975.

Misc. No. 75-0205

MEMORANDUM

This case is about the crash of a United States Air Force C-5A cargo plane during the closing days of the Vietnam War in connection with the so-called "Baby Lift" of Vietnam orphans. The disaster was allegedly caused by the failure in flight over international waters of the rear loading door of a United States Air Force plane. This failure depressurized the plane, and broke vital controls. These airborne accidents forced an emergency landing in a swamp short of the base in Vietnam from which the flight originated. Approximately half of the 330 crewmembers and passengers were killed and many of the survivors were injured, some in the air, some as a result of the impact.

Numerous tort claims have been filed against the Lockheed Corporation (hereinafter "Lockheed") which manufactured the C-5A and sold it to the United States Government (hereinafter "Government"). Lockheed has subsequently sought claims over against the Government through third-party complaints based on theories of contribution and of contractual and non-contractual indemnity. The Judicial Panel on Multidistrict Litigation of the United States has transferred to this Court for consolidated pretrial proceedings those cases not originally filed here.

Presently pending before the Court is the motion of the Government to dismiss three individual third-party complaints representative of the three categories of plaintiffs in this consolidated case: (1) military servicemen of the United States, (2)

federal civilian employees of the United States, and (3) civilians not employed by the United States.*

The Court's alleged bases for jurisdiction over the third-party complaints lie in the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. §§ 1346(b), *et seq.*, in several federal admiralty acts,* and in this Court's jurisdiction over contract claims against the Government which do not exceed $10,000. 28 U.S.C. § 1346(a)(2).

The Government's motion principally challenges the Court's jurisdiction under the FTCA, although it implicitly denies jurisdiction under any other statute. The FTCA waives the Government's sovereign immunity from liability for tort with certain specified exceptions. 28 U.S.C. § 2674. Liability under the Act is determined "in accordance with the law of the place where the [tortious] act or omission occurred." 28 U.S.C. § 1346(b). The waiver permits not only direct action against the Government, but also third-party actions based on theories of contribution or indemnity. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

I.

The Government has moved to dismiss all three categories of third-party complaints on the ground that they are barred by an express statutory exception to the FTCA commonly referred to as the foreign country exception, 28 U.S.C. § 2680, which provides in pertinent part:

> The provisons of this chapter and section 1346(b) of this title shall not apply to—
>
> * * *
>
> (k) Any claim arising in a foreign country.

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* This last category includes the Vietnamese orphans.

* Suits in Admiralty Act, 46 U.S.C. §§ 741, *et seq.*; Death on the High Seas Act, 46 U.S.C. §§ 761, *et seq.*; Public Vessels Act, 46 U.S.C. §§ 781, *et seq.*

The provision effects the legislative decision that the Government's liability should not be determined by the substantive tort law of a foreign country. *United States v. Spelar,* 338 U.S. 217, 221 (1949). Thus, for the Government to succeed on this basis, it must demonstrate that its liability would necessarily be determined by the law of a foreign country, presumably that of the former Republic of South Vietnam. The Government argues that this legal conclusion is unavoidable in light of the express language of § 1346(b) that the Court apply "the law of the place where the act or omission occurred." The Government literally construes this provision as meaning the place where the alleged tortious conduct had its operative effect, the situs of the injury, where the aircraft impacted in a swamp in Vietnam.

The Court is not persuaded by the authority cited by the Government in support of this contention. There is apparent merit in the recent construction by the Ninth Circuit that this phrase directs the application of the law of the place where the negligent acts or omissions leading to the accident occurred. *Roberts v. United States,* 498 F.2d 520 (9th Cir.), *cert. denied,* 419 U.S. 1070 (1974). Such a construction is not dependent on the fortuity of impact, and it offers a more direct, effective application of the potential prophylactic effect of local tort law by applying the law of the place that can strike at the cause of the tort, rather than that of the place which can only ameliorate the consequences of tortious conduct and punish the tortfeasor.

Consistent with this position, the Court will not necessarily apply the law of Vietnam. Moreover, for the purpose of the instant motion, the Court must accept as true the well-pled allegations of the opponent to the motion. The motion alleges that the negligent acts or omissions occurred solely in the United States prior to the C-5A's departure to Vietnam. The Court should thus look to the whole law* of one of the states in which the alleged negligence possibly occurred to see if its choice of law rules would automatically and invariably apply the law of South Vietnam. But this inquiry is premature. There has been no factual determination as to where the allegedly

* *Richards v. United States,* 369 U.S. 1 (1962).

negligent act did occur, nor has the Government attempted to show that any domestic forum would apply the tort law of a foreign government which no longer even exists. Therefore, the Court will deny the pending motion to the extent it is based on the foreign country exception. This aspect of the denial of the motion, however, will be without prejudice to its revival by the Government should discovery disclose that the critical negligence occurred in some forum, including Vietnam, the choice of laws of which would demand the application of Vietnamese law.**

II.

There remain for consideration several sub-grounds for the Government motion. The first to be considered is whether claims by military service personnel are barred by FTCA. The Government's Motion to Dismiss the third-party complaint of the military service personnel is governed by the recent Supreme Court decision in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977). *Stencel* held that a private entity which had paid damages to an injured military person could not claim over against the United States under the FTCA. The Supreme Court related this bar to idemnification to its earlier decision in *Feres v. United States,* 340 U.S. 135 (1950). *Feres* held that the FTCA did not create a new cause of action which would permit military personnel to maintain tort claims against the Government.

The *Stencel* opinion identified three elements of the *Feres* holding and applied them to a suit for indemnity or contribution. These factors were: (1) the "distinctively federal" nature of the Government's relationship with the military; (2) the provision for military personnel of a so-called "no fault"

** Lockheed also contends that a different threshhold test to determine where the negligent act or omission occurred should be applied if liability is governed within the meaning of one of the various federal admiralty acts relied on by Lockheed. The Court makes no ruling on this contention other than to note that the Government should address it, if it later revives this motion.

compensation program, and (3) the unique function of discipline in the military. In both *Feres* and *Stencel*, the Supreme Court noted that service in the military is an inherently dangerous and transient occupation attended by significant risks of injury and accident. A direct or indirect cause of action under the FTCA would subject the Government to broad and frequent exposure to claims involving a "great variability in the potentially applicable tort law . . . . " *Stencel, supra,* 431 U.S. at 673. Furthermore, the Court noted, such a cause of action would be unfair to military personnel killed or injured because they have no control over their geographic location and hence no choice over the tort law applicable under the FTCA. *Feres, supra,* 340 U.S. at 142-43. The Court observed that Congress' provision of the no fault compensation scheme through the Veterans' Benefits Act* was designed to create a federal resolution of the problems inherent in this federal relationship by establishing automatic, uniform relief for military plaintiffs and by setting a necessary upper limit to the Government's broad and inevitably frequent exposure to service claims. *Stencel, supra,* 431 U.S. at 672-73.

In addition to these first two relatively technical considerations, the *Feres-Stencel* opinions emphasized the third factor: the potential effect on military discipline of a decision that the FTCA authorized military personnel and their representatives to sue the Government in tort. Such actions (whether direct or third party) would involve "second guessing military orders, and would often require members of the Armed Services to testify in Court as to each other's decisions and actions." *Stencel, supra,* 431 U.S. at 673.

The facts alleged in the third-party complaint here about military personnel are indistinguishable from the facts at issue in *Stencel, supra.* The Court will, accordingly, dismiss that complaint to the extent it invokes the FTCA.

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* 38 U.S.C. §§301, *et seq.*

III.

The Motion to Dismiss the third-party complaint in the case of a federal civilian employee turns on the so-called "exclusivity clause" contained in the Government's no fault compensation scheme for its civilian employees, the Federal Employees Compensation Act (hereinafter "FECA"), 5 U.S.C. § 8101, *et seq.* The Government points out, and Lockheed concedes, that the Government's tort liability to its civilian employees is provided exclusively by FECA and that there is no election of remedies. 5 U.S.C. § 8116(c). The Government urges that, since there is no direct action against it, the Court should analogize this case to that of the military servicemen discussed above and similarly deny a third-party action.

Although the decisions of the Circuit Courts of Appeal are in conflict regarding whether a third-party action can be maintained on behalf of a deceased Government employee in these circumstances, the Court is not persuaded by the Government's reliance on *Stencel, supra.* Government employees are not subjected to the same degree of compulsory relocation or job-connected injury or death as are the military. The civilians' response to their superiors is a function of reason and not command. As the Court reads the Supreme Court opinions, no fault compensation, the features of which the two plans have in common, was less significant to decision than the special circumstances of the military. Accordingly, the Court will deny the motion to dismiss the claim with respect to Government civilian employees under FECA insofar as it relies upon the military personnel precedent.

In reaching this conclusion, the Court has also considered the decisions involving a possible bar of third-party claims by similar exclusivity provisions in other statutes. In *Ryan Co. v. Pan Atlantic, Corp.*, 350 U.S. 124 (1956), the Supreme Court held that the exclusivity provision in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905, did not bar a suit based on a contract right to indemnity. The parties concede that such a right exists in this case. The Government points out, however, that the Tucker Act limits this Court's

jurisdiction to claims "not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States . . . ."* Lockheed urges the Court to defer dismissing these claims until "it has been established that the liability of the United States for contribution and/or indemnity will exceed $10,000 in amount in each case."** The Court notes that Lockheed's claims are only for those sums awarded plaintiffs "which are not compensated by insurance or otherwise compensated . . . ." No evidence about insurance coverage has been brought to the Court's attention during the consideration of these motions. It is not clear from the third-party complaint, therefore, that Lockheed's claim overs will exceed $10,000. The Court will, therefore, retain jurisdiction at least until there is some evidence in the record that these claim overs exceed the $10,000 jurisdictional amount after deductions for insurance or otherwise. *But cf. Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968). (Contention that verdicts rendered may be less than $10,000 held insufficient to maintain District Court's jurisdiction when there was no intent to limit indemnity claims to that amount.)

Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) presents an alternate barrier to the Government's Motion to Dismiss. In *Weyerhaeuser,* the Supreme Court extended the holding in *Ryan* to a case where "there was no contractual relationship between the United States and the petitioner, governing their correlative rights and duties . . . . [But there was] instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners [in a mutual fault collision]." 372 U.S. at 603. The Court noted that it had held long ago that this rule of admiralty "must prevail over a statutory provision which, like [the FECA's

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* 28 U.S.C. §1346(a)(2).

** Lockheed's Consolidated Statement of Points and Authorities in Opposition to the Motion of Third-Party Defendant, United States of America, to Dismiss, p. 63.

exclusivity provision], limited the liability of one of the shipowners . . . ." *Id.**

The Government urges that the *Weyerhaeuser* decision should be limited to admiralty cases involving surface transportation and points out that the bulk of lower court decisions have not extended its limitations on FECA's exclusivity clause to ordinary tort actions brought under the FTCA. The Government did not, however, address Lockheed's contention that the mission and flight of the C-5A bore a "significant relationship to traditional maritime activity" such that this case may properly fall within the purview of the several admiralty statutes that Lockheed relies on for its fifth cause of action. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972). Hence, even under the Government's limited reading of *Weyerhaeuser,* it has failed to make a proper and complete case for dismissal.**

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* The Court notes that the divided damages rule of admiralty law relied on in *Weyerhaeuser* has been superseded by a comparative negligence principle. *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975). It would be premature for the Court to rule at this time what significance, if any, that change in the law has on this case.

** As to the Government's claim that the Court should follow those Circuits which have declined to extend *Weyerhaeuser* to "ordinary tort" cases (including the D.C. Circuit), the Court is presently inclined to the view that a federal law of contribution and indemnity should be applied in aviation accidents involving plaintiffs from many districts and that, where the Government's involvement in the circumstances leading to the accident is as great as it appears to be in the present case, the Government's duty to the plaintiffs and to the manufacturer argues heavily against an automatic rule of no contribution or indemnity. *See Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974) *cert. denied sub. nom. Forth Corp. v. Allegheny Airlines, Inc.,* 421 U.S. 978 (1975). A final ruling on this issue may not be appropriate at this time when it is as yet unclear whether this is an admiralty or ordinary tort.

An Order implementing the foregoing decisions is attached.

/s/ LOUIS F. OBERDORFER

United States District Judge

Dated: May 19, 1978

United States District Court
for the District of Columbia

In Re Air Crash Disaster
Near Saigon, South Vietnam
on April 4, 1975.

Misc. No. 75-0205

MEMORANDUM

There is before this Court all the litigation which has grown out of the 1975 crash near Saigon of a Lockheed-built United States Air Force C-5A transport plane carrying United States military and civilian personnel and 226 Vietnamese orphans. The orphans were aboard the plane pursuant to arrangements made for them by the Untied States and Friends for All Children ("FFAC"), a Colorado non-profit corporation. During the United States' involvement in Vietnam, FFAC had provided care and shelter for orphans there and had arranged for the adoption of a number of them by foster parents in the United States and elsewhere.

Actions against Lockheed on behalf of Vietnamese orphans who survived the crash and on behalf of estates of those who died were filed against Lockheed in the District Court of the District of Columbia by FFAC as original diversity cases. Actions against Lockheed by surviving United States citizens and on behalf of the estates of deceased ones were filed in or removed to various federal courts around the country. Some were originally filed here; others were transferred by the Multi-District Panel.

The Court assumes, without deciding, that it has diversity jurisdiction of the decedents' and surviving orphans' cases, either pursuant to this Court's alienage jurisdiction, 28 U.S.C. § 1332(a)(2), or the Court's domestic diversity jurisdiction, 28 U.S.C. § 1332(a)(1). A careful determination of the jurisdiction of the Court with respect to each meritorious case must await the outcome of communications by the *guardian ad litem*

with the legal guardians of the surviving orphans and the heirs or next of kin of the decedents. At that time the Court will be in a position to act on a complete record, *compare* Addendum to Exhibit J-1, Exhibits to Lockheed's Motion for Summary Judgment in C.A. No. 76-0544, and with the benefit of full briefing by all parties.[1]

Lockheed has claimed over against the United States, which is now a third party defendant in all the cases.

The Court and the parties are proceeding with the administration of these cases on two main tracks. The cases brought by and on behalf of United States citizens have been the principal forum for vigorous discovery, and one of them is scheduled for trial in November, 1979, pursuant to pre-trial order entered on January 4, 1979. *Thomas v. Lockheed,* C.A. No. 75-1831. Another case filed on behalf of the estate of Joanna Pray, a deceased Vietnamese, by the same lawyers who represent FFAC is on the same pretrial schedule as *Thomas* and will be tried in November if *Thomas* is not.

Meanwhile, on the other track, administration of the orphan cases has been impeded by collateral issues relating to the qualification of FFAC as a proper representative of the surviving orphans and the estates of the deceased orphans, and

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[1] The general rule in the case of prosecution of a claim on behalf of an estate by an executor or administrator is that the citizenship of the representative of the estate determines citizenship for diversity purposes. *See Mecom v. Fitzsimmons Drilling Company,* 284 U.S. 183 (1931). This principle suggests that the citizenship of the legal representatives of the estates of the deceased orphans in the present cases should determine diversity. *Compare McAlpin v. James McKoane Enterprises, Inc.,* 395 F. Supp. 937 (N.D. Miss. 1977); *Bush v. Carpenter Bros., Inc.,* 447 F.2d 707 (5th Cir. 1971); *Sadler v. New Hanover Memorial Hospital, Inc.,* 432 F. Supp. 604 (D.C. N.C. 1977). The minor legal representatives in the present actions, however, appear before the Court by a *guardian ad litem.* The general rule appears to be that in a diversity suit brought by a minor it is the citizenship of the minor and not that of the minor's representative that determines diversity. *See Ziady v. Curley,* 396 F.2d 873 (4th Cir. 1969). Some courts, on the other hand, have reached a contrary result, holding the citizenship of the representative determinative. *See e.g., DiStefano v. Leigh Valley R.R. Co.,* 258 F. Supp. 721 (E.D. Pa. 1966); *compare Fallat v. Gouran,* 220 F.2d 325 (3rd Cir. 1955).

the possible disqualification of the lawyers representing FFAC.[2] For example, FFAC may have a conflict of interest because of its possible liability to the orphans and the estates on account of its role in arranging what may prove to be unconventional and unsafe transportaton for those killed and injured. In addition, the United States and Lockheed took vigorous exception to efforts by FFAC not only to substitute foster parents for FFAC as next friend of surviving children but also to substitute them as clients of FFAC's lawyers. Finally, the Court and the parties have been unable to design a satisfactory solution to the problem growing out of the practical fact that some of the estates represented by FFAC may have no beneficiaries, so that prosecution of some estates' claims might prove to be useless exercises ending with payments by the United States Government and Lockheed that would escheat to some local jurisdiction, after deduction of attorneys fees.[3]

On February 23, 1979,[4] after careful consideration of briefs filed by Charles R. Work, Esq.,[5] as court-appointed *amicus curiae,* responding briefs by the parties and extensive oral argument by *amicus* and counsel, the Court appointed Mr. Work and his law firm as *guardian ad litem* to represent the interests of the surviving orphans and the infant beneficiaries of the estates, at least until the above-mentioned difficulties could

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[2] Motion by Third-party Defendant, the United States, for Order To Show Cause; August 21, 1978; C.A. 75-974 and 76-544.

[3] There remains unresolved the question of whether the Office of Foreign Assets Control, Department of the Treasury, would act to freeze any recovery by Vietnamese citizens pursuant to the Trading with the Enemy Act, as amended, 50 U.S.C. App. 5. *See* Submission of United States of America on applicability of Trading with the Enemy Act, filed May 4, 1978, Misc. 75-0205: Letter from Stanley L. Sommerfield, Acting Director, Office of Foreign Assets Control, to Ms. Barbara Allen Babcock, Assistant Attorney General.

[4] The Court's order of February 23, 1979, was filed in Misc. 75-0205. See Transcript of Proceedings, Friday, March 2, 1979. The Misc. 75-0205 docket has always functioned as the Master Docket in the Saigon Air Crash case, in accordance with Suggested Procedures for Multi-district Litigation, 75 FRD 589 (1977). Any order affecting two or more actions is filed in the Master Docket.

[5] Mr. Work is a leader and former President of the District of Columbia Bar.

be resolved, and, in the interim, to take initiatives under Court supervision to resolve them.[6]

The effect of the February 23, 1979 appointment was to allow FFAC to continue to maintain the actions on behalf of the estates and surviving infants in collaboration with the Court-appointed *guardian ad litem* unless and until FFAC is replaced by the newly-appointed guardian or by some other legal representative (in the cases of the estates) or next friend or guardian (in the cases of the surviving infants).[7]

The February 23, 1979, Order also denied Lockheed's motion for summary judgment with respect to the survivors and its renewed motion for summary judgment with respect to the decedents. The thrust of both motions was that, under applicable law, FFAC lacked capacity to bring these lawsuits on behalf of either the surviving orphans or the estates of the deceased ones.

With respect to the surviving orphans, Lockheed maintained in support of its motion that FFAC was neither legal guardian of the infants nor appropriate next friend to bring this lawsuit on their behalf because FFAC was not formally appointed and was not entitled to assume its responsibilities by operation of law. *See* Lockheed's Memorandum in Support of its Motion for Summary Judgment, C.A. 76-0544, Sept. 29, 1979. The Court concluded that it was unnecessary to unravel the tangled web of foreign and domestic legal problems spun by Lockheed's motion. *See* Fed. R. Civ. P. 17(c).[8] FFAC had the capacity as a legal person "who has an interest in the

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[6] Mr. Work's duties as *guardian* are defined in paragraphs 3 and 7 of the February 23, 1979 Order.

[7] The *guardian ad litem*, the adoptive parents or legal representatives proceeding individually are, of course, free to select their own counsel.

[8] Rule 17 (c) provides, in relevant part, that:

> "If an infant or an incompetent person does not have a duly appointed representative he may sue by his next friend or by a *guardian ad litem*. The court shall appoint a *guardian ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

welfare of an infant who may have a grievance or a cause of action" to initiate these actions on behalf of the surviving orphans as a "next friend." *Child v. Beame,* 412 F. Supp. 593, 599 (S.D.N.Y. 1976); Fed. R. Civ. P. 17(c).

Subsequent argument by Lockheed raised the possibility that FFAC may have a conflict of interest because of liability to the surviving orphans. *See* Lockheed's Reply to FFAC's Opposition to Lockheed's Motion for Summary Judgment, Point IV, C.A. 76-0544, November 20, 1978. In light of this potential conflict and pursuant to its duty to ensure proper representation of infant plaintiffs the Court has appointed Mr. Work and his law firm as *guardian ad litem.* Fed. R. Civ. Proc. 17(c). Mr. Work will be alert to recognize actual and potential conflicts and will manage the notification procedure set out in the Court's Order of February 23, 1979 without displacing FFAC. *See Horacek v. Exon,* 357 F. Supp. 71 (D. Neb. 1973); *Noe v. True,* 507 F.2d 9 (6th Cir. 1974); *see also United States v. E.I. DuPont de Nemours & Co.,* 13 F.R.D. 98 (N.D. Ill. 1952). The appointment of Mr. Work thus cured for the present any lingering defects in FFAC's capacity to maintain this lawsuit on behalf of surviving orphans alleged in connection with Lockheed's summary judgment motion. Accordingly, Lockheed's motion for summary judgment in the survivors' cases, C.A. 76-0544, was denied in the Order filed February 23, 1979.

With respect to the estates, Lockheed's motion contended that the District of Columbia law authorizing a "legal representative" to sue on behalf of an estate, D.C. Code § 12-101, is inapplicable to the decedents' cases under choice of law-conflicts of law principles; Lockheed maintained that the capacity of FFAC or any other representative to represent the estates of the deceased orphans is governed by the law of Colorado or Vietnam, neither of which would have permitted FFAC to maintain this action on behalf of the estates. *See* Lockheed's Motion for Reconsideration of its Motion for Summary Judgment, C.A. 75-0874, May 31, 1978. In denying Lockheed's renewed motion for summary judgment with respect to the claims on behalf of the estates the Court has

resolved the choice of law question in favor of the law of the District of Columbia, specifically D.C. Code § 12-101 governing the survival of actions.[9]

In a Memorandum filed on May 1, 1978, the Court held that while FFAC may not be a perfect legal representative for the estates of deceased orphans, it was the best one before the Court at the time and fell within the broad definition of legal representative as used in D.C. Code § 12-101. Any possible defects in the recognition of FFAC as a legal representative put at issue by the Lockheed motion are also cured for the present by the appointment of Mr. Work as *guardian ad litem* to represent the interests of infant beneficiaries, *i.e.*, heirs or next of kin, of the estates of the deceased orphans. Mr. Work and his law firm are the Court-appointed guardian of the minor legal representatives of the deceased orphans, *see Strother v. District of Columbia*, 372 A.2d 1291 (D.C. App. 1977), and are entitled to pursue these actions, under the supervision of the Court, pursuant to the authority of Fed. R. Civ. P. 17(c) and

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[9] *See* pp. 7-13, *infra*.

D.C. Code § 12-101 provides, in relevant part, that:

> "On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor or against the legal representative of the deceased."

The term "legal representative" has been held to apply to "any person who, whether by virtue of testamentary act or by operation of law, stands in the place of the decedent with respect to his property . . . ." *Strother v. District of Columbia*, 372 A.2d 1291, 1296 (D.C. App. 1977). *And see Thomas v. Doyle*, 187 F.2d 207 (D.C. Cir. 1951). The term is not restricted to duly appointed personal representatives, *i.e.*, executors or administrators. *Strother v. District of Columbia, id.* FFAC's responsibilities for the transportation arrangements could also affect its capacity as "legal representative."

The District of Columbia Survival Statute is not, by its terms, limited to injuries incurred in the District of Columbia. *Compare* the District of Columbia Wrongful Death Statute, D.C. Code § 16-2701.

D.C. Code § 12-101.[10] Accordingly, Lockheed's renewed motion for summary judgment in the decedents' cases, C.A. 75-0874, was denied in the Order filed February 23, 1979.

The February 23, 1979 Order also indicated the Court's intention to explain its reasons for refusing to displace the law of the forum, the District of Columbia, as the rule of decision in the decedents' cases. The remainder of this Memorandum sets out the Court's reasons for this decision.

In deciding not to displace the law of the forum as furnishing the applicable rule of decision in the decedents' cases the Court has applied the "interest analysis" process used in the District of Columbia to settle choice of law questions.[11] In "interest analysis" the Court must consider whether the public policy of a particular legislature would be furthered, frustrated or irrelevant if applied in the case at bar and will displace the law of the forum only if the policy of the legislature of another forum has a stronger interest.

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[10] Under District of Columbia law, heirs or next of kin are entitled to recognition as legal representatives in a survival action on behalf of a decedent's estate. *See Thomas v. Doyle*, 187 F.2d 207 (D.C. Cir. 1950); *Strother v. District of Columbia*, 372 A.2d 1291 (D.C. App. 1977). Where, as here, there are heirs or next of kin who are themselves minors a *guardian ad litem* is the appropriate instrumentality to protect their interests pending administration of the decedents' estates. Fed. R. Civ. P. 17(c).

[11] Whether by virtue of law, *see Semler v. Psychiatric Inst.*, 575 F.2d 922, 926-31 (D.C. Cir. 1978); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), or of custom, *see Lee v. Flintkote Company*, No. 77-1355, slip op. at n. 14 (D.C. Cir. Jan. 11, 1979), a federal court exercising diversity jurisdiction in the District of Columbia looks to District of Columbia decisions to provide applicable choice of law.

District of Columbia decisions generally apply an "interest analysis" approach to determine the law applicable in tort cases. *Semler v. Psychiatric Inst.*, 575 F.2d at 924. Under this approach, the court attempts to discover and evaluate, for each potential source of law, what interest the legislature of that jurisdiction may have in applying its law to the parties and circumstances in the case. *See Semler v. Psychiatric Inst., id. See generally* Crampton, Currie, Kay, Conflict of Laws: Cases, Comments, Questions (1975) at 206-296. Although "contacts" with a jurisdiction may be relevant to studying the relationship between the circumstances of a lawsuit and the legislative policies of a jurisdiction, these contacts serve only as one means to ascertain the

(footnote continues)

Precedent offers only limited guidance for interest analysis in the present case because the status of the passengers and the carrier is *sui generis*. The pleadings and undisputed facts show that this crash has put at state unique policy interests. The victims were civilian orphans, natives of a jurisdiction, the Republic of South Vietnam, which itself perished as a government a few days after the crash. The orphans were being taken to new homes and new parents in other countries on a United States Air Force plane specially detailed by the United States for this mission. It is unnecessary for conflicts of law purposes to resolve the tantalizing legal questions regarding the legal status of the orphans at the time of the crash vis-a-vis natural parent and adoptive parent. They were orphans of the Vietnam War. The United States Government (as distinguished from any State of the United States) carried on that war and ended it for national foreign policy and military purposes. The transportation of the orphans on a United States Air Force C-5A, built by Lockheed, was incident to carrying out those foreign and military policies. If the death and injury suffered by these orphans in the dying days of the Vietnam war was caused by the negligence of the United States or of Lockheed, which built the plane expressly for the United States and to its specifications, that is a matter of far greater interest and concern to the United States than to any State of the United States. It is a "paramount" interest and concern of the United States federal government that its courts provide a just and reasonable resolution of claims such as those on behalf of the estates of the deceased orphans. *Compare United States v. California*, 332 U.S. 19, 40 (1947).

(footnote continued)

relevance of such policies, and thereby to identify a legislature's interest, if any, in adjudicating the case pursuant to its laws; "contacts" are not ends in themselves. *See also Tramontana v. S.A. Empressa De Viacao Aerea Rio Grandense*, 350 F.2d 468, 471 (D.C. Cir.), *cert. den.* 383 U.S. 943 (1966); *compare Textile Museum v. Eberstadt & Co., Inc.*, 440 F. Supp. 30, 32 (D.C.D.C. 1977).

There is no reason, in the present case, why District of Columbia law regarding survival of actions, including the element of capacity to sue, should not be applied *in toto*: there is no call for *dépecage*. *Compare Currie, id.*, at 378-89; n. 13, *infra*.

The District of Columbia law of survival of actions was enacted by Congress pursuant to its constitutional power and responsibility to "exercise exclusive legislation in all Cases whatsoever, over the . . . Seat of the Government of the United States." U.S. CONST. Art. I, § 8, cl. 17.[12] The pleadings and discovery afford ample basis for the Court to conclude for purposes of this interim and limited ruling that officials acting at the Seat of the Government were the ultimately responsible actors in the chain of circumstances and specific events which ended in the deaths and injuries at issue here. Because of the national interests at stake here, the law of the forum, which is the law enacted by Congress for the Seat of the Government, should be displaced only if some other jurisdiction has an overwhelming policy interest in applying its own law. *See In re Paris Air Crash,* 399 F. Supp. 732, 745 (C.D. Calif. 1975). *Compare Currie, supra,* n. 11, at 221-224.

Those jurisdictions claimed by Lockheed or FFAC to have a stronger or equal interest so as to be an appropriate source of law for the present cases are: Georgia, the site of the Lockheed plant which built the ill-fated plane for the United States; Colorado, the place of FFAC's incorporation and the source of its letters of administration for the deceased orphans' estates; Virginia, the headquarters of the Departments of Defense and

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[12] This constitutional provision represents

> "an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is . . . the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised . . . ." *O'Donoghue v. United States,* 289 U.S. 516, 538-39 (1932).

Pursuant to its constitutional authority Congress has enacted legislation in the District of Columbia governing the survival of causes of action. The District of Columbia Survival Statute, D.C. Code § 12-101, was enacted by Congress and represents a Congressionally determined policy governing survival of actions.

Air Force; and Vietnam, the scene of the crash and the original home of the orphans.[13]

There is no legal or functional basis for any contention that the law and policy of any jurisdiction relating to survival of actions is more appropriate to the decendents' cases than the Congressionally enacted law of the District of Columbia. To recite these alternative sources of law is to expose the relative insignificance of the States' interests compared to that of the

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[13] California might be thought to have a special interest in this litigation since Lockheed is a California corporation and California has an interest in protecting California residents from excessive financial burdens. *See In re Paris Air Crash*, 399 F. Supp. at 743. Whatever interest California may have, it is not of sufficient magnitude to displace the Congressionally enacted law of the forum: the District of Columbia law on survival of actions. This must also be Lockheed's position since Lockheed has not argued either in its Motion for Summary Judgment or in its Motion for Reconsideration that the law of California should apply to these actions.

In any event, the only element of California law which could further California's interest in protecting its residents from burdensome judgments is the California law regarding limitation of damages in death cases. *See Hurtado v. Superior Court*, 11 Cal.2d 574, 584; 522 P.2d 666, 672 (1974); *In re Paris Air Crash*, 399 F. Supp. at 744-45. The Court's own research, although not exhaustive, does not indicate that the survival statute passed by Congress would allow a greater recovery against Lockheed than the California survival statute, California Probate Code § 573. Both D.C. Code § 12-101 and California Probate Code § 573 prevent the abatement of a cause of action in favor of (or against) an injured party and provide for its enforcement by (or against) a representative of the deceased. *Compare Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1954) *with Jones v. Rogers Memorial Hospital*, 442 F.2d 773 (D.C. Cir. 1971). Both statutes base recovery on the probable future earnings of the deceased. *Compare Strother v. District of Columbia*, 372 A.2d 1291 (1977) *with Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913 (1946). California Probate Code § 573 explicitly excludes recovery for pain and suffering. Prior to August 2, 1978, D.C. Code § 12-101 also barred recovery for pain and suffering. District of Columbia law 2-95, effective August 2, 1978, removes this bar and allows recovery for pain and suffering under the D.C. Survival Statute. This amendment to D.C. Code § 12-101 is not applicable to the present causes of action since they accrued before the amendment became effective. Both the District of Columbia and California statutes allow recovery of punitive damages under appropriate circumstances. *See Pease v. Beech Aircraft Corp.*, 113 Cal.2d 450 (1974) and *Gibbs, Etc. v. Investigators of D.C.*, 105 Washington Law Reporter 1 (D.C. App.), January 3, 1977.

United States as embodied in the Acts of Congress relating to the District of Columbia. Neither Colorado, Georgia, nor Virginia has any interest in providing compensation for the decedents' estates since none of the decedents resided in the United States at the time of their deaths, nor do there exist any medical creditors. *Compare* B. Currie, Selected Essays on the Conflict of Laws (1963) at 701-702. With respect to Colorado, suffice it to say that it ill behooves either defendant to seek application of the law of Colorado in light of their contentions about the significance of FFAC's contacts with its wards and beneficiaries; a natural corollary is the relative smallness of Colorado's interest in this lawsuit. The interest claimed for Georgia by FFAC—maintaining Georgia's reputation as a place where safe planes are built—is likewise dwarfed by comparison with the interest of the United States that the rule of decision, including the element of capacity, be the law of the Seat of the Government.[14]

The interest of Vietnam, in contrast, might weigh heavily here if these decedents had not crashed while in the process of permanently emigrating and if the government which might have had an interest had not been conquered and extinguished by another government which apparently has no such interest.[15]

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[14] This is particularly true in light of federal preemption of the field of aviation regulation, *see In re Paris Air Crash*, 399 F. Supp. at 746; *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d at 403; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and the fact that the airplane here was a military airplane used by the United States Air Force. Whatever legitimate interest Georgia may have in discouraging the manufacture of defective airplanes, Georgia's interest is no greater than that of any other State, not to mention Congress, in discouraging the manufacture of such airplanes. No evidence has been advanced in support of any argument that defective airplanes manufactured in Georgia have a greater likelihood of injuring Georgia residents or property than residents or property in any other State, or of doing any injury to Georgia in a *parens patriae* sense.

[15] Insofar as present Vietnamese law might allow recovery by those who might have expected maintenance from the decedents if they had lived, that policy is irrelevant where, as here, the decedents are all orphans and were permanently departing for homes and families elsewhere before the accident occurred. Similarly, the interest Vietnam might have in providing recovery for deceased residents so as, for example, to provide not only for the

(footnote continues)

This is not to suggest that in any other diversity case the rule of decision should be the law of the District of Columbia because the lawsuit has national importance. These orphans were en route to the United States when they were killed and injured. The United States is a party now. These cases were filed in this forum; the Multi-District panel has assigned all the companion cases here. More importantly, the United States had a special role in the design of the plane that crashed, and in the general circumstances and the particular events which culminated in the crash. Neither the United States nor Lockheed may prove to be legally liable for the crash or the resulting damages. But the United States, as a sovereign in the international sense, is best served, and neither any other jurisdiction, nor Lockheed, is measurably disadvantaged, by a decision that the law of the forum, enacted by Congress as the rule of decision for cases in the Seat of Government, should not

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(footnote continued)

beneficiaries of a decedent's estate, but also to satisfy the claims of possible medical creditors, is largely irrelevant where, as here, the decedents were no longer residents of Vietnam at the time of the accident and the record does not disclose the existence of any medical creditors. Vietnam therefore has no significant interest in applying its law to the claims of the deceased orphans in this case.

There is an additional reason for not applying a Vietnamese rule of decision that would differ significantly from United States law that lies in the nature and function of this Court. As the Court of Appeals for the Fifth Circuit noted in refusing to apply Cambodian law to the claims of two Americans injured in Cambodia:

> "We are a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States. We conclude that in this case we have no warrant, legal or moral, to frustrate well established American policies by an application of the local policies of a foreign government." *Challoner v. Day and Zimmerman*, 512 F.2d 77, 82 (5th Cir. 1975).

Accord In re Paris Air Crash, 399 F. Supp. at 745.

be displaced.[16] For these reasons the Court so ruled on February 23, 1979.

/s/ LOUIS F. OBERDORFER

United States District Judge

Dated: April 12, 1979

[16] Application of the survival statute enacted by Congress to this action advances the national interest and impairs no interest of Colorado, Virginia, Georgia or Vietnam. This situation is very different from one in which some foreign jurisdiction has a significant interest in the application of its law and the forum state has no such interest. In such circumstances there may be a good reason to apply foreign law, *see, e.g., Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d at 471, and the Due Process and Full Faith and Credit Clauses are available to enforce such an obligation. *See, e.g., Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *see also Huntington v. Attrill*, 146 U.S. 657 (1892).

There might also be a Constitutional obligation to apply the law of another State in a second situation that is also distinguishable from the case at bar: *viz.*, where the result otherwise would be unduly disruptive of the national policy of fashioning a uniform system of enforcement of the rights and duties created by the States. *See e.g., Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *but compare National Mutual B. & L. Ass'n. v. Brahan*, 193 U.S. 625 (1964).

Here, on the other hand, no such imbalance of interests presents itself in the application of District of Columbia law; no Constitutional principle forbids the application of this law to this case. *See Semler v. Psychiatric Inst.*, 575 F.2d at n. 25; *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935). *Compare Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *see generally* Currie, *Selected Essays, supra*, at 188-282.

Appendix D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 75-1831

No. 80-1323

VINCENT C. THOMAS, JR. Administrator
of the Estate of ANN NASH BOTTORFF,
Deceased, Individually and on behalf
of all others similarly situated

v.

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,
Defendant & third-party plaintiff

v.

THE UNITED STATES OF AMERICA,
Third-party defendant, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TAMM, ROBB and EDWARDS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

Date: September 30, 1981
Opinion for the Court filed by Circuit Judge Tamm.

Appendix E

Statutes Involved

5 U.S.C. § 8116(c)

§ 8116. Limitations on right to receive compensation

* * *

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

28 U.S.C. § 1346(b)

§ 1346. United States as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

(List of counsel on inside cover)

PETITION FOR CERTIORARI FILED DECEMBER 23, 1981
CERTIORARI GRANTED APRIL 5, 1982

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RELEVANT DOCKET ENTRIES
(D.C.Cir.)

DATE	FILINGS—PROCEEDINGS
3-21-80	Copy of notice of appeal and docket entries from the District Court
4-30-80	Certified Original Record
9-30-80	Appellant's brief
10-16-80	Appellant's supplemental statement of facts to the brief (filed under seal)
12-23-80	Appellee's (Lockheed) brief
3-19-81	Appellant's reply brief
3-26-81	Joint Appendix
6-9-81	Argued before Tamm, Robb and Edwards, CJs
10-6-81	Opinion for the Court filed by Circuit Judge Tamm
10-6-81	Judgment that the judgment of the District Court is reversed and this case is remanded for further proceedings in accordance with the opinion filed herein this date
4-7-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 81-1181 on April 5, 1982.

RELEVANT DOCKET ENTRIES
(D.D.C.)

DATE	PROCEEDINGS
1975	
Nov. 4	COMPLAINT
1976	
Jan. 9	ANSWER by deft. to complaint
Jan. 9	THIRD-PARTY COMPLAINT by deft. adding The United States of America as third-party deft.
Mar. 10	ANSWER by third-party deft. to third-party complaint
1979	
Jan. 4	PRETRIAL ORDER
Jul. 5	ORDER amending pretrial order
Sept. 10	ORDER amending pretrial order
Sept. 10	PRETRIAL BRIEF by Pltf.
Sept. 10	JOINT PRETRIAL SUBMISSION by Pltf., Deft. and Third-Party Deft.
Sept. 25	PRETRIAL BRIEF by deft. Lockheed Aircraft Corporation
Oct. 3	ORDER directing Third-Party deft. to file response to defts. pretrial brief by 10-5-79 and deft. to respond by 10-12-79
Oct. 5	PRETRIAL BRIEF by Third-Party deft. U.S.A.
Oct. 11	PRETRIAL REPLY BRIEF by deft.
Nov. 19	MOTION by deft. Lockheed for Summary Judgment; Memorandum; Defendant/Third-Party Plaintiff Lockheed and Third-Party Defendant United States' Joint statement of material facts as to which there is no genuine issue.

DATE	PROCEEDINGS
1979	
Nov. 19	MOTION by Third-Party Deft., UNITED STATES to Dismiss; P and A's. (orig. filed in Misc. 75-0205)
Nov. 20	STIPULATION by Third-Party Deft. and Third-Party Plaintiff (filed under seal)
Nov. 28	RESPONSE by Third-Party Deft. U.S.A. to motion by Lockheed for summary judgment.
Nov. 30	OPPOSITION by deft. Lockheed to the motion of third-party deft. U.S.A. to dismiss.
Dec. 7	ORDER granting motion of Lockheed as Third-Party Pltf. against United States as Third-Party Deft. for summary judgment
1980	
Jan. 23	FINAL JUDGMENT
Mar. 20	NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., 7013 Union Mill Road, Clifton, Virginia 22024, Administrator of the Estate of Ann Nash Bottorff, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,

SERVE: C.T. Corporation System
918 Sixteenth Street, N.W.
Washington, D.C. 20006

Defendant.

COMPLAINT

[Filed Nov. 4, 1975]

(CLASS ACTION FOR NEGLIGENCE, STRICT TORT LIABILITY, BREACH OF WARRANTY AND PUNITIVE DAMAGES)

1. Plaintiff Vincent C. Thomas, Jr., administrator of the Estate of Ann Nash Bottorff, deceased, ("Plaintiff's Decedent") is a citizen of the State of Virginia and Plaintiff's Decedent was a citizen of the State of Virginia.

2. Defendant Lockheed Aircraft Corporation ("LOCKHEED") is a corporation incorporated under the laws of the State of California and having its principal place

of business in the State of California, and is authorized to do, and is presently doing business under the laws of the District of Columbia.

3. Jurisdiction of this Court is invoked pursuant to Title 28 United States Code, § 1332(a). The matter in controversy with respect to Plaintiff's claim, and with respect to the claim of each member of class on whose behalf Plaintiff brings this suit, exceeds the sum of $10,000, exclusive of interest and costs.

4. Prior to the commencement of this action, Plaintiff Vincent C. Thomas, Jr., was duly appointed administrator of the Estate of Ann Nash Bottorff, deceased, and Letters of Administration were issued to him by the Circuit Court of Arlington County, Virginia on August 17, 1975.

5. On or about April 4, 1975, an American Air Force Galaxy C-5A Aircraft ("Aircraft"), designed, manufactured, assembled, fabricated, produced, inspected, tested, maintained, sold and/or leased and delivered to the United States Government by LOCKHEED, crashed shortly after take-off from an airport at or near the City of Saigon, South Vietnam. Said crash resulted in the death of at least 170 persons from among the passengers and crew, including Plaintiff's Decedent, and injuries to numerous others.

CLASS ACTIONS ALLEGATIONS

6. This action is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, as well as on behalf of the individually named Plaintiff.

(a) Plaintiff satisfies the requirements of Rule 23(a) in that:

(1) The class of which Plaintiff is a member and on whose behalf he brings this action, consists of the personal representatives, heirs, and next-of-kin of the more than 170 passengers and

crew members who died as a result of the crash of an American Air Force Galaxy C-5A Aircraft on or about April 4, 1975, following takeoff from an airport in or near the City of Saigon, South Vietnam ("Crash"), and individuals and guardians *ad litem* of individuals who sustained personal injuries as a result of the Crash. The class is so numerous that joinder of all members is impracticable.

(2) All members of the class have claims arising from a common disaster which raises questions of law or fact common to all class members, which include, but are not limited to:

(A) Whether LOCKHEED is liable to the class as a whole as well as to each member of the class for compensatory damages for negligence, strict tort liability, and/or breach of warranty in the design, manufacture, assembly, fabrication, production, inspection, testing, maintenance, sale and/or lease and delivery of the Aircraft and for the failure to warn the United States, Plaintiff's Decedent and the other class members of the inherent defects in the Aircraft.

(B) Whether the conduct of LOCKHEED as described in subdivision (A) above was malicious, willful, wanton, reckless and grossly negligent so as to make LOCKHEED liable for punitive damages to the class as a whole as well as to each member of the class.

(3) Plaintiff's claims are typical of the claims of the class in that they:

(A) arise from the same occurrence;

(B) seek recovery from the same Defendant;

(C) seek both compensatory and punitive damages;

(D) may be divided into sub-classes with respect to any potential conflicting issues not common to the class as a whole, *i.e.*, wrongful death, survival or personal injury actions.

(4) As the representative of the class, Plaintiff will fairly and adequately protect the interests of the class:

(A) Plaintiff's claims, and the claims of the class as a whole and each member thereof, arise from the same set of operative facts.

(B) Plaintiff has no claims contrary to or in any way inconsistent with any known interests of the class as a whole or any individual class member.

(C) Plaintiff is committed to the prosecution of this action on his behalf and on behalf of the class and has retained counsel competent and experienced in class action litigation.

(b) Plaintiff satisfies the requirements of Rule 23(b)(1) of the Federal Rules of Civil Procedure in that the prosecution of separate actions by individual members of the class would create a risk of:

(1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendant; and

(2) adjudications with respect to individual members of the class which would as a practical

matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

(c) In addition, Plaintiff satisfies the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure in that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(1) There is no conceivable interest of any member of the class in individually controlling the prosecution of a separate action. All issues relating to Defendant's liability, as well as its degree of culpability and the imposition of punitive damages, present questions of law and/or fact common to all members of the class. These common issues can be fairly, efficiently and effectively adjudicated only by means of the class action. Any issues which may not be common to the class, such as the measure of damages to be awarded each individual class member, can be separated from the class action pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure.

(2) As far as is known, five other actions have been commenced by individual members of the class against LOCKHEED as a result of the subject Crash. These actions present claims substantially identical to those raised by Plaintiff in this action. Substantial discovery has not as yet commenced in these related proceedings.

(3) The District of Columbia Circuit is a particularly desirable forum for concentrating

the litigation of the claims of the class. Most of the deceased and injured members of the class, other than foreign nationals, are believed to have been employed by the United States Government, and it is therefore believed that pertinent records relating to members of the class would be most readily available in the District of Columbia. In addition, the United States Government was operating the Aircraft at the time of the crash; and, although not a party, will have an involvement in this litigation. The District of Columbia is believed to be the most convenient forum for the Government to the extent that it is necessary for the Government to become involved. This is the second action for the class filed in this District.

(4) The class is not so large as to be unmanageable, and no difficulties are anticipated in prosecuting the case as a class action.

COUNT I.

(NEGLIGENCE)

7. Paragraphs 1 through 5 are realleged and incorporated herein by reference.

8. At some time prior to April 4, 1975, LOCKHEED, through its agents, employees and/or servants, designed, manufactured, assembled, fabricated, produced, inspected, tested, maintained, sold and/or leased and delivered the Aircraft to the United States Government.

9. On or about April 4, 1975, Plaintiff's Decedent, Ann Nash Bottorff, the decedents whose estates are represented by other members of the class, and those members of the class and representatives of members of the class who sustained personal injuries, were lawfully passengers or crew members on the Aircraft.

10. On or about April 4, 1975, at a time when all members of the class were aboard, the Aircraft crashed after take-off from Tan Son Nhut Airport at or near the City of Saigon, South Vietnam, causing injuries to all members of the class and death to more than 170 passengers and crew members.

11. The crash, the resulting personal injuries and the deaths of members of the class were caused by the negligence of LOCKHEED, its agents, employees and/or servants acting within the scope of their employment.

12. On or about April 4, 1975, during and/or following the flight of the Aircraft and up to and including the times of their injuries and/or deaths, each member of the class suffered, and those surviving the Crash continue to suffer, great mental anguish, fright, shock, anxiety and/or physical pain and suffering both in anticipation and as a result of the Crash. Said Crash resulted in the death, conscious pain and suffering, personal injury and or property loss of each member of the class.

13. Plaintiff's Decedent is survived by three daughters, Evelyn E. Bottorff, Sarah M. Bottorff, and Christina R. Bottorff, all of whom, as a result of said Crash and the resultant death of their mother, have sustained great damage including, but not limited to: sorrow; mental anguish; solace; loss of society, companionship, comfort, guidance, kindly offices and advice of the Decedent; loss of income and services of the Decedent; loss of protection, care and assistance provided by Decedent; and loss of inheritance of future accumulations to the Decedent's estate and other related damages. Upon information and belief, each of the other class members who represent the estate of a decedent either sustained or represent persons who have sustained similar losses.

14. The injuries to the members of the class, including Plaintiff's Decedent, and the resulting death of Plain-

tiff's Decedent and other members of the class, were solely caused by the negligence of LOCKHEED, its agents, employees and/or servants, without any negligence on the part of Decedent, or any other member of the class, contributing thereto.

15. The negligence on the part of LOCKHEED included, but was not necessarily limited to:

(a) selling and/or leasing and delivering the Aircraft to the United States while it was in a dangerous, defective, and deficient condition;

(b) negligently designing and constructing the Aircraft;

(c) failing to conduct sufficient, reasonable, adequate and comprehensive research and tests of the Aircraft;

(d) failing to ascertain the proper and safe methods of operating and controlling the Aircraft under the conditions which prevailed at the time of the Crash;

(e) failing to use safe and adequate materials in the construction, assembly, fabrication and manufacture of said Aircraft;

(f) failing to provide safe and adequate flight controls, instrumentation, guidance control and safety mechanisms on said Aircraft;

(g) failing to adequately warn the United States, Plaintiff's Decedent, and the other members of the class, of the dangerous and hazardous conditions existing with respect to the Aircraft;

(h) knowingly equipping the Aircraft with defective, insufficient and second-hand or scrap parts;

(i) failing to formulate, promulgate and distribute proper and sufficient safety regulations for the operation of the Aircraft;

(j) failing to furnish proper instructions relating to the operation, maintenance, inspection, testing, and use of the Aircraft prior to the Crash;

(k) permitting the Aircraft to be used for the transportation of passengers and crew without such modification or repairs as were necessary to prevent the Crash; and

(l) diverse other acts of negligence, carelessness, recklessness and wanton conduct with respect to the Aircraft.

16. Solely as a consequence of LOCKHEED's negligent, careless conduct, and its failure to exercise ordinary and reasonable care and caution, the heirs of Plaintiff's Decedent have been damaged in the sum of Five Million Dollars ($5,000,000) by the wrongful death of their mother; and Plaintiff's Decedent was damaged in the sum of One Million Dollars ($1,000,000) as a consequence of the grave injuries suffered by her as a result of the Crash, prior to her death; and each member of the class has been similarly damaged in amounts not yet determined, but which exceed the sum of Ten Thousand Dollars ($10,000) for each such member of the class, exclusive of interest and costs.

COUNT II.

(STRICT TORT LIABILITY)

17. Paragraphs 1 through 5 and 8 through 13 are realleged and incorporated herein by reference.

18. Prior to April 4, 1975, LOCKHEED, through its agents, employees and/or servants designed, manufactured, assembled, fabricated, produced, inspected, tested, sold and/or leased and delivered the Aircraft to the United States Government in such manner as to render the Aircraft defective and unsafe for its intended and reasonably foreseeable uses. Said sale and/or lease was

completed with LOCKHEED's full knowledge that the Aircraft would be used to transport persons by air.

19. On or about April 4, 1975, the Aircraft was being operated according to the use for which it was designed, manufactured, assembled, fabricated, produced, inspected, tested, sold and/or leased, to wit, transporting persons by air, and it was in substantially the same condition as it was when delivered by LOCKHEED.

20. The death of Plaintiff's Decedent, the other passengers and the crew members and the personal injuries to all members of the class, were the result of the defective, improper, and unsafe manner in which LOCKHEED designed, manufactured, assembled, fabricated, produced, inspected, tested, sold and/or leased and delivered the Aircraft and its failure to properly modify or repair or determine the necessity for modifications or repair of the Aircraft.

21. As a consequence of the foregoing, LOCKHEED is strictly liable in tort to Plaintiff in the sum of Five Million Dollars ($5,000,000) for the wrongful death of Plaintiff's Decedent and in the sum of One Million Dollars ($1,000,000) for the injuries suffered by Plaintiff's Decedent prior to her death. Also as a consequence of the foregoing, LOCKHEED is strictly liable in tort to each member of the class in amounts not yet determined but which exceed Ten Thousand Dollars ($10,000) for each class member, exclusive of interest and costs.

COUNT III.

(BREACH OF WARRANTY)

22. Paragraphs 1 through 5 and 8 through 13 are realleged and incorporated herein by reference.

23. LOCKHEED, its agents, employees and/or servants, either knew, or in the exercise of reasonable care

and caution under the circumstances, should have known that the Aircraft was not properly designed, manufactured, assembled, fabricated, produced, tested and/or inspected and that it would create an unreasonable risk to any and all persons who might be passengers or crew members on the Aircraft, including Plaintiff's Decedent and the other class members herein, and that the use of the Aircraft for its intended purposes would be inherently dangerous.

24. LOCKHEED, its agents, employees and/or servants were under a duty to properly test and inspect the Aircraft, to determine its airworthiness and to prepare, supply and make available to the owners, users and operators of the Aircraft all data and information relating to the Aircraft so that such owners, users, and operators could properly and safely operate and maintain the Aircraft in such a manner and condition as to make it safe and to prevent unreasonable risks to passengers and crew members.

25. LOCKHEED, its agents, employees and/or servants expressly and/or impliedly warranted to all owners, users and operators and all passengers and crew members, including Plaintiff's Decedent and all other members of the class, that the Aircraft was of merchantable quality and reasonably fit for the particular purpose for which it was planned, designed, manufactured, assembled, installed, modified, repaired, serviced, sold or leased and delivered. LOCKHEED expressly and/or impliedly warranted to the passengers and crew on the Aircraft that the manuals and other information applicable and necessary for the safe and proper operation of said Aircraft was furnished and provided by LOCKHEED and that the information furnished was adequate and proper for persons using, operating and owning the Aircraft to properly and safely operate the Aircraft under all conditions which could reasonably be expected. In addi-

tion, LOCKHEED expressly and/or impliedly warranted to all passengers and crew, including Plaintiff's Decedent and all other class members, that their passage aboard the Aircraft would be reasonably safe.

26. Prior to boarding the Aircraft, Plaintiff's Decedent and all other class members relied upon the warranties referred to in Paragraph 25, *supra*.

27. LOCKHEED breached the express and/or implied warranties referred to in Paragraph 25, *supra*, in that the Aircraft was not airworthy, of merchantable quality or fit for the particular purpose for which it was designed, manufactured, assembled, fabricated, produced, inspected, tested, sold and/or leased and delivered; the information LOCKHEED supplied was not adequate to maintain the Aircraft in safe and reliable condition and LOCKHEED failed to supply information necessary to enable persons owning, using and operating the Aircraft to properly and safely operate it; and LOCKHEED failed to take reasonable, adequate and effective precautions to insure the safe operation of the Aircraft.

28. As a direct and proximate consequence of LOCKHEED's breaches of warranty, the Aircraft crashed causing severe and permanent personal injuries to all members of the class and the death of Plaintiff's Decedent and other members of the class.

29. Solely as a consequence of the foregoing, LOCKHEED is liable to Plaintiff for breach of its express and implied warranties for the wrongful death of Plaintiff's Decedent in the sum of Five Million Dollars ($5,000,000); for the personal injuries sustained by Plaintiff's Decedent in the sum of One Million Dollars ($1,000,000); and is liable to each member of the class in amounts not yet determined but which exceed the sum of Ten Thousand Dollars ($10,000) for such member of the class, exclusive of interest and costs.

COUNT IV.

(PUNITIVE DAMAGES)

30. Paragraphs 1 through 5, 8 through 13 and 18 through 20 and 23 through 28 are realleged and incorporated herein by reference.

31. LOCKHEED's conduct was malicious, grossly negligent, wanton and reckless and in willful disregard of the rights and safety of the Aircraft's passengers and crew, including Plaintiff's Decedent and all members of the class, in that LOCKHEED knew or had reason to know prior to April 4, 1975, that the Aircraft was defectively designed, manufactured, assembled, fabricated, produced, inspected, tested, sold and/or leased and delivered and, that under circumstances then and there prevailing, it constituted an inherently dangerous vehicle for air transportation.

32. Solely as a consequence of the foregoing, LOCKHEED is liable for punitive damages to the class as a whole in the aggregate sum of One Billion Dollars ($1,000,000,000) to be divided among the members of the class in such proportions as the Court deems just and proper.

* * * *

WHEREFORE, Plaintiff demands judgment against LOCKHEED as follows:

(a) On each of Counts I through III of the Complaint, the sum of Five Million Dollars ($5,000,000) as a result of the death of Plaintiff's Decedent and the sum of One Million Dollars ($1,000,000) for the injuries suffered by her as a result of the Crash prior to her death; and for all other class members damages in an amount not yet determined which exceed Ten Thousand Dollars ($10,000) for each member of the class, exclusive of interest and costs;

(b) On Count IV, the sum of One Billion Dollars ($1,000,000,000) to the class as a whole for punitive damages; and

(c) Costs and disbursements of this action.

COLE AND GRONER, P.C.

By /s/ Alan Y. Cole
ALAN Y. COLE
LEE A. SCHUTZMAN
1730 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 331-8888

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury on all Counts and as to all issues of its Complaint filed against Defendant LOCKHEED AIRCRAFT CORPORATION.

COLE AND GRONER, P.C.

By /s/ Alan Y. Cole
ALAN Y. COLE
LEE A. SCHUTZMAN
1730 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 331-8888

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

DEFENDANT DEMANDS TRIAL BY JURY

VINCENT C. THOMAS, JR., 7013 Union Mill Road, Clifton, Virginia 22024, Administrator of the Estate of Ann Nash Bottorff, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,
2555 N. Hollywood Way, Box 551,
Burbank, California 91520,

Defendant.

DEFENDANT LOCKHEED AIRCRAFT CORPORATION'S ANSWER TO COMPLAINT

[Filed Jan. 9, 1976]

Defendant Lockheed Aircraft Corporation and its division, Lockheed-Georgia Company (hereinafter referred to as "Lockheed"), by its attorneys, Haight, Gardner, Poor & Havens, for its answer to the complaint herein:

I. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph 1 of the complaint.

II. Upon information and belief, denies each and every allegation contained in paragraph 2 of the complaint, except that it admits that it is a corporation duly existing under and by virtue of the laws of the state of Cali-

fornia and that it is engaged in some business activities in the District of Columbia.

III. Denies knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraphs 3 and 4 of the complaint.

IV. Upon information and belief, denies each and every allegation contained in paragraph 5 of the complaint, except that it admits that it sold and delivered to the United States Air Force a certain Galaxy C-5A aircraft for use as a military aircraft, and that said aircraft was designed, in part, and portions of which were manufactured and assembled by defendant Lockheed, and that on or about April 4, 1975, a Galaxy C-5A aircraft owned and operated by the United States Air Force with some passengers aboard crashed in the vicinity of Saigon, South Vietnam, but said defendant denies knowledge or information thereof sufficient to form a belief as to whether plaintiff's decedent named in the caption to this complaint was on board said aircraft at the time of the crash.

V. Upon information and belief, denies each and every class action allegation contained in paragraph 6 of the complaint and all subparagraphs thereof, and further denies that this action fulfills any of the prerequisites for class action determination set forth in Rule 23 of the Federal Rules of Civil Procedure.

AS TO COUNT I

VI. Answering the allegations of paragraph 7 of the complaint, defendant Lockheed hereby repeats and realleges each and every admission and denial contained in paragraphs I through V of this answer, insofar as they relate to paragraphs 1 through 5 of the complaint, with the same force and effect as if herein repeated and set forth at length.

VII. Upon information and belief, denies each and every allegation contained in paragraph 8 of the complaint except that it admits that it sold and delivered to the United States Air Force a certain Galaxy C-5A aircraft for use as a military aircraft, and that said aircraft was designed, in part, and portions of which were manufactured and assembled by defendant Lockheed.

VIII. Upon information and belief, denies each and every allegation contained in paragraph 9 of the complaint.

IX. Upon information and belief, denies each and every allegation contained in paragraph 10 of the complaint, except that it admits that on or about April 4, 1975, a Galaxy C-5A aircraft owned and operated by the United States Air Force with some passengers aboard crashed in the vicinity of Saigon, South Vietnam.

X. Upon information and belief, denies each and every allegation contained in paragraphs 11, 12, 13, 14, 15 and 16 of the complaint, and all subparagraphs thereof.

AS TO COUNT II

XI. Answering the allegations of paragraph 17 of the complaint, defendant Lockeed hereby repeats and realleges each and every admission and denial contained in paragraph I through X of this answer, insofar as they relate to paragraphs 1 through 5 and 8 through 13 of the complaint, with the same force and effect as if herein repeated and set forth at length.

XII. Upon information and belief, denies each and every allegation contained in paragraphs 18, 19, 20 and 21 of the complaint.

AS TO COUNT III

XIII. Answering the allegations of paragraph 22 of the complaint, defendant Lockheed hereby repeats and realleges each and every admission and denial contained

in paragraphs I through XII of this answer, insofar as they relate to paragraphs 1 through 5 and 8 through 13 of the complaint, with the same force and effect as if herein repeated and set forth at length.

XIV. Upon information and belief, denies each and every allegation contained in paragraphs 23, 24, 25, 26, 27, 28 and 29 of the complaint.

AS TO COUNT IV

XV. Answering the allegations of paragraph 30 of the complaint, defendant Lockheed hereby repeats and realleges each and every admission and denial contained in paragraphs I through XIV of this answer, insofar as they relate to paragraphs 1 through 5, 8 through 13, 18 through 20, and 23 through 28 of the complaint, with the same force and effect as if herein repeated and set forth at length.

XVI. Upon information and belief, denies each and every allegation contained in paragraphs 31 and 32 of the complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XVII. The complaint fails to state a claim against defendant Lockheed upon which relief can be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XVIII. The venue of this action in this Court is improper and inconvenient for the Court and the parties.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XIX. That plaintiff Vincent C. Thomas, Jr., lacks the capacity to sue as the administrator and representative of the estate of the decedent named in the above-captioned complaint.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XX. That plaintiff Vincent C. Thomas, Jr., lacks legal capacity, standing or authority to sue, is not the real party in interest in this action, and has failed to join as parties all persons needed for a just adjudication of plaintiff's alleged claims.

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXI. That plaintiff Vincent C. Thomas, Jr., is not the real party in interest as a representative of the estate of the decedent in the above-captioned complaint, and all necessary parties have not been joined herein.

AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXII. Following the delivery to the United States of the subject aircraft, and prior to the crash thereof as alleged in the complaint, said aircraft was altered, changed and modified, and subjected to misuse, abuse and damage, so that its condition was altered from that in which it was when delivered to the United States Air Force by defendant Lockheed.

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXIII. That the accident referred to in the complaint herein resulted solely and wholly from the fault, neglect and want of care and misuse of such aircraft by persons other than defendant Lockheed, for whose acts said defendant is not responsible and not as a result of any negligence, fault or want of care on its part or on the part of its agents, servants or employees.

AS AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXIV. Any alleged defects or defective conditions in the Galaxy C-5A aircraft alleged to have been present

in the aircraft at the time of the accident referred to in the complaint were not the proximate cause of that accident.

AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXV. Any alleged defects or defective conditions in the Galaxy C-5A aircraft alleged to have been present in the aircraft at the time of the accident referred to in the complaint that allegedly caused that accident were the result of changes made in the condition of such Galaxy C5-A aircraft which were neither made by nor caused to be made by defendant Lockheed or were the results of changes which were permitted to develop by third parties, all of which changes were made or permitted to develop after said Galaxy C-5A had left the control of defendant Lockheed.

AS AND FOR A TENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXVI. The plaintiff's decedent and all other persons, if they were aboard the Galaxy C-5A aircraft involved in the accident referred to in the complaint herein, accepted transportation at a time when extreme political unrest and chaos existed in South Vietnam, and the accident occurred in a country which the persons knew or should have known was involved in a constant state of hostilities and open warfare, hence plaintiff's decedent and all other persons if they were aboard the C-5A aircraft assumed the risk of transportation from Saigon, South Vietnam.

AS AND FOR AN ELEVENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXVII. Any injury, damage or loss, if any, sustained by plaintiffs herein, or any of them, was proximately caused by and contributed to by the negligence on the part of plaintiff's decedent, and each of them, in that

said persons failed to exercise ordinary care on their own behalf at the time and in the places set forth in the complaint.

AS AND FOR A TWELFTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXVIII. Any injury, damage or loss, if any, sustained by the plaintiffs herein, or any of them, was proximately caused and contributed to by the negligence on the part of plaintiff's decedents, agents, servants and employees and fellow servants in the places and at the times set forth in the complaint.

AS AND FOR A THIRTEENTH SEPARATE AND COMPLETE DEFENSE TO THE COMPLAINT

XXIX. Any injury, damage or loss, if any, sustained by plaintiffs herein, or any of them, was proximately caused by risks assumed by plaintiff's decedents, and each of them, in that plaintiff's decedents, and each of them, had full knowledge of the conditions which created said risk and plaintiff's decedents, and each of them, further appreciated the danger thereof.

WHEREFORE, defendant Lockheed demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: Washington, D.C.
January 9, 1976

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
Lockheed Aircraft Corporation

By /s/ Carroll E. Dubuc
CARROLL E. DUBUC
1819 H Street, N.W.
Washington, D.C. 20006
(202) 737-7847

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., 7013 Union Mill Road, Clifton, Virginia 22024, Administrator of the Estate of Ann Nash Bottorff, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,
Defendant and Third-Party Plaintiff,

-against-

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

THIRD-PARTY COMPLAINT

[Filed Jan. 9, 1976]

Defendant and third-party plaintiff Lockheed Aircraft Corporation (hereinafter "Lockheed"), for its third-party complaint against the third-party defendant, The United States of America, alleges, upon information and belief, as follows:

FOR A FIRST CLAIM AGAINST THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA

1. At all times hereinafter mentioned defendant and third-party plaintiff Lockheed was and still is a corporation organized and existing under the laws of the State of California.

2. The jurisdiction of this Court as to this claim alleged against third-party defendant, The United States of America, is founded upon 28 U.S.C. §§ 1346, *et seq.*, commonly known as the Federal Tort Claims Act.

3. On or about November 4, 1975, an action was commenced in the United States District Court for the District of Columbia, entitled "Vincent C. Thomas, Jr., Administrator of the Estate of Ann Nash Bottorff, Deceased, Individually and on behalf of all others similarly situated, Plaintiffs, against Lockheed Aircraft Corporation, a California corporation, Defendant," bearing Docket No. 75-1831, and on or about November 6, 1975, copies of the summons and complaint in said action were served on defendant Lockheed. Defendant's time to answer was extended by agreement of counsel and by order of this court.

4. Attached hereto and made a part hereof as Exhibit A is a copy of the complaint filed herein by plaintiff against defendant Lockheed.

5. It is alleged in said complaint, *inter alia*, that on or about April 4, 1975, plaintiff's decedent was a passenger on board a certain Lockheed C-5A aircraft, owned and operated by the United States Government, that said C-5A aircraft crashed on said date after its take-off from Saigon, South Vietnam, resulting in the death of plaintiff's decedent, and that as a result thereof plaintiff was damaged in a sum of excess of $10,000.

6. Defendant and third-party plaintiff Lockheed denies that the crash of the aforesaid Lockheed C-5A on April 4, 1975, was caused by any negligent or wrongful act or omission to act on its part, or on the part of any of its agents, servants, or employees.

7. If any negligent or wrongful act or omission to act of the defendant and third-party plaintiff Lockheed is found to have occurred in connection with the circumstances of the aforementioned accident, such negligence

was not the proximate cause thereof or of any damage or loss sustained by the plaintiff.

8. Said accident and any alleged consequential damage to plaintiff was caused by certain careless, negligent and wrongful acts or omissions to act of the third-party defendant, The United States of America, which acts or omissions to act occurred within the borders of the United States, in that the third-party defendant, The United States of America, by its agents, servants or employees acting within the scope of their employment, failed to adequately maintain, repair and make modifications to the aforementioned C-5A aircraft, failed to provide adequate spare parts and components at given field locations as necessary to repair and maintain said aircraft thereby requiring the implementation of a cannibalization program detrimental to flight safety, failed to adequately train and supervise its repair and maintenance personnel who performed work on said aircraft in the United States, and failed to adequately rig the aircraft and its components prior to the aircraft's departure from the United States for Saigon, South Vietnam, and was otherwise negligent in the premises.

9. If any negligent or wrongful act or omission to act by the defendant and third-party plaintiff Lockheed is found to have occurred in connection with the circumstances of the aforementioned accident and is found to have caused or contributed thereto, such act or omission was, in relation to the careless, negligent and wrongful acts or omissions to act of the third-party defendant, The United States of America, a passive or secondary act or omission to act.

10. Defendant and third-party plaintiff Lockheed breached no legal duty to the plaintiff and his decedent. But if it is found that Lockheed did breach such a legal duty, the duty of The United States of America to the plaintiff and his decedent was, in relation to any duty found to be owed by Lockheed, the primary duty, and

The United States of America is primarily liable for the damages sought in the complaint herein.

11. If defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it in the complaint herein, third-party defendant, The United States of America, is liable to the third-party plaintiff Lockheed to indemnify it in whole, or partially in proportion to the respective degrees of responsibility of the parties herein, together with all costs, attorneys' fees and expenses incurred in the defense of this action, and said defendant and third-party plaintiff Lockheed accordingly asserts herein its right to such indemnity.

FOR A SECOND CLAIM AGAINST THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA

12. Defendant and third-party plaintiff Lockheed repeats and realleges each and every allegation contained in paragraphs 1 through 10 of this third-party complaint, with the same force and effect as if herein repeated and set forth at length.

13. If, as a result of the matters alleged in the complaint, defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it in the complaint herein, third-party defendant, The United States of America, will be liable to third-party plaintiff Lockheed for contribution in proportion to the respective degrees of responsibility of the parties herein, and said defendant and third-party plaintiff Lockheed accordingly asserts herein its right to such contribution.

FOR A THIRD CLAIM AGAINST THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA

14. Defendant and third-party plaintiff Lockheed repeats and realleges each and every allegation contained in paragraphs 1 and 3 through 7 of this third-party

complaint with the same force and effect as if herein repeated and set forth at length.

15. The jurisdiction of this Court as to this claim alleged against third-party defendant, The United States of America, is founded upon 46 U.S.C. §§ 740, *et seq.*, commonly known as the Suits In Admiralty Act; 46 U.S.C. §§ 761, *et seq.*, commonly known as the Death On The High Seas Act; and 46 U.S.C. §§ 781, *et seq.*, commonly known as the Public Vessels Act, in that the death of plaintiff's decedent was caused and precipitated by wrongful acts, neglect or default which occurred or were consummated on board a public vessel of the United States on the high seas beyond a marine league from the shore of any state.

16. Said accident and the death of plaintiff's decedent and any alleged consequential damage to plaintiff was caused by certain careless, negligent and wrongful acts or omissions to act of the third-party defendant, The United States of America, which acts or omissions to act occurred or were consummated at a time when the aforementioned C-5A aircraft was on the high seas beyond a marine league from the shore of any state, in that third-party defendant, The United States of America, by its agents, servants or employees acting within the scope of their employment, failed to properly load and subsequently failed to properly operate said aircraft in a safe manner under existing procedures, failed to adequately maintain, repair and make modifications to the aforementioned C-5A aircraft, failed to provide adequate spare parts and components at given field locations as necessary to repair and maintain said aircraft thereby requiring the implementation of a cannibalization program detrimental to flight safety, failed to adequately train and supervise its repair and maintenance personnel who performed work on said aircraft in the United States, and failed to adequately rig the aircraft and its components prior to the aircraft's departure from the

United States for Saigon, South Vietnam, and was otherwise negligent in the premises.

17. If any negligence or wrongful act or omission to act by the defendant and third-party plaintiff Lockheed is found to have occurred in connection with the circumstances of the aforementioned accident and is found to have caused or contributed thereto, such act or omission was, in relation to the careless, negligent and wrongful acts or omissions to act of the third-party defendant, The United States of America, a passive or secondary act or omission to act.

18. Defendant and third-party plaintiff Lockheed breached no legal duty to the plaintiff and his decedent, but if it is found that Lockheed did breach such a legal duty, the duty of The United States of America to the plaintiff and his decedent was, in relation to any duty found to be owed by Lockheed, the primary duty, and The United States of America is primarily liable for the damages sought in the complaint herein.

19. If defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it in the complaint herein, third-party defendant, The United States of America, is liable to the third-party plaintiff Lockheed to indemnify it in whole or partially in proportion to the respective degrees of responsibility of the parties herein, together with all costs, attorneys' fees and expenses incurred in the defense of this action, and said defendant and third-party plaintiff Lockheed accordingly asserts herein its right to such indemnity.

FOR A FOURTH CLAIM AGAINST THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA

20. Defendant and third-party plaintiff Lockheed repeats and realleges each and every allegation contained in paragraphs 1, 3 through 7, and 15 through 18 of this third-party complaint with the same force and effect as if herein repeated and set forth at length.

21. If, as a result of the matters alleged in the complaint, defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it in the complaint herein, third-party defendant, The United States of America, will be liable to third-party plaintiff Lockheed for contribution in proportion to the respective degrees of responsibility of the parties herein, and said defendant and third-party plaintiff Lockheed accordingly asserts herein its right to such contribution.

FOR A FIFTH CLAIM AGAINST THIRD-PARTY DEFENDANT THE UNITED STATES OF AMERICA

22. Defendant and third-party plaintiff Lockheed repeats and realleges each and every allegation contained in paragraphs 1 and 3 through 5 of this third-party complaint with the same force and effect as if herein repeated and set forth at length.

23. The jurisdiction of this Court as to this claim alleged against third-party defendant, The United States of America, is founded upon 28 U.S.C. § 1346(a)(2).

24. On the 7th day of June, 1971, third-party defendant, The United States of America, entered into a certain agreement with defendant and third-party plaintiff Lockheed relating to Lockheed's manufacture, sale and delivery of C-5A aircraft to The United States Air Force, entitled Supplemental Agreement No. 1000 to Contract AF 33(657)-15053.

25. The C-5A aircraft which is involved in this litigation was manufactured, sold and delivered by defendant and third-party plaintiff Lockheed to third-party defendant, The United States of America, pursuant to the terms, specifications and recommendations of The United States Air Force under the Base Contract AF 33(657)-15053, subject to the terms, provisions and conditions of the aforementioned Supplemental Agreement No. 1000, and the instigation of litigation stemming from the crash

of said aircraft on April 4, 1975 has given rise to certain covenants and obligations made by third-party defendant, The United States of America, to defendant and third-party plaintiff Lockheed under said Agreement.

26. Defendant and third-party plaintiff Lockheed has well and dutifully performed all of its conditions and obligations under the aforementioned Supplemental Agreement No. 1000.

27. General Provision 29 of the aforementioned Supplemental Agreement No. 1000, relating to "insurance—liability to third persons" consists of the following:

> (c) The Contractor shall be reimbursed: (i) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (ii) without regard to and as an exception to the "Limitation of Cost" or the "Limitation of Funds" clause of this contract, for liabilities to third persons for loss of or damage to property (other than property (A) owned, occupied or used by the Contractor or rented to the Contractor, or (B) in the care, custody, or control of the Contractor), or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, his agents, servants or employees, provided such liabilities are represented by final judgments or settlements approved in writing by the Government, and expenses incidental to such liabilities, except liabilities (I) for which the Contractor is otherwise responsible under the express terms of the clause or clauses, if any, specified in the Schedule, or (II) with respect to which the Contractor has failed to insure as required or maintain insurance as approved by the Contracting Officer or (III) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors

or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the performance of this contract. The foregoing shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required to be submitted for approval or required to be procured and maintained pursuant to the provisions of this clause, provided such cost would constitute Allowable Cost under this contract.

28. If as a result of the matters alleged in the complaint, defendant and third-party plaintiff Lockheed is held liable for all or any part of the claims asserted against it in the complaint herein, such claims being in excess of $10,000.00, pursuant to General Provision 29(c) of the aforementioned Supplemental Agreement No. 1000, third-party defendant, The United States of America, will be obliged to indemnify defendant and third-party plaintiff Lockheed for any and all amounts which the plaintiff may be awarded as against defendant and third-party plaintiff Lockheed which are not compensated by insurance or otherwise compensated, and said defendant and third-party plaintiff Lockheed accordingly asserts herein its right to such indemnity.

WHEREFORE, defendant and third-party plaintiff Lockheed demands:

(1) On the first, second, third and fourth causes of action of this third-party complaint, that this Court dismiss the complaint herein as against it, or, in the event that a judgment is entered against it in favor of

the plaintiffs, demands that a judgment be entered in its favor for indemnification and/or contribution against third-party defendant, The United States of America, for all sums that may be recovered against it by the plaintiff, together with reasonable attorneys' fees, and the costs and expenses incurred in defending this action;

(2) On the fifth cause of action of this third-party complaint, judgment in its favor for indemnification against third-party defendant, The United States of America, for any and all sums which the plaintiff may be awarded as against defendant and third-party plaintiff Lockheed which are not compensated by insurance or otherwise compensated, together with reasonable attorneys' fees and the costs and expenses incurred in defending this action.

Dated: Washington, D.C.
January 9, 1976

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
Lockheed Aircraft Corporation

By /s/ Carroll E. Dubuc
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(202) 737-7847

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of Ann Nash Bottorff, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

LOCKHEED AIRCRAFT CORPORATION,
a California corporation,
Defendant and Third-Party Plaintiff,

vs.

UNITED STATES OF AMERICA,
Third-Party Defendant

ANSWER TO THIRD PARTY COMPLAINT

[Filed Mar. 10, 1976]

1. Paragraph 1 of the Third Party Complaint contains allegations of which the Third Party Defendant United States is without information sufficient to form a belief as to the truth of the matters contained therein and therefore these allegations are denied.

2. The allegations contained in Paragraph 2 of the Third Party Complaint present a question of law which is respectfully referred to the Court for its determination.

3. The allegations contained in Paragraph 3 of the Third Party Complaint are matters of public record and are admitted.

4. As Paragraph 4 of the Third Party Complaint merely refers to an attachment to the Third Party Complaint, no responsive answer is warranted.

5. In response to the allegations incorporated by reference and contained in Paragraph 5 of the Third Party Complaint, the Third Party Defendant United States avers that the plaintiff was not damaged to the extent claimed in said paragraph.

6. In response to the allegations contained in Paragraph 6 of the Third Party Complaint, the Third Party Defendant United States avers that the crash of the C-5A on April 4, 1975 was caused entirely by the negligence of agents, servants and employees of the Third Party Plaintiff, Lockheed Aircraft, Inc.

7. In response to the allegations contained in Paragraph 7 of the Third Party Complaint, the Third Party Defendant United States avers that the negligence of the agents, servants and employees of the Third Party Plaintiff Lockheed Aircraft, Inc. was the proximate cause of the crash.

8. The Third Party Defendant United States denies each and every allegation contained in Paragraph 8 of the Third Party Complaint.

9. The Third Party Defendant United States denies each and every allegation contained in Paragraph 9 of the Third Party Complaint.

10. The Third Party Defendant United States of America denies each and every allegation contained in Paragraph 10 of the Third Party Complaint.

11. Third Party Defendant United States denies each and every allegation contained in Paragraph 11 of the Third Party Complaint.

12. As Paragraph 12 of the Third Party Complaint incorporates the allegations of Paragraphs 1 through 10

of the Third Party Complaint, Third Party Defendant United States incorporates its respective answers thereto.

13. Third Party Defendant United States denies each and every allegation contained in Paragraph 13 of the Third Party Complaint.

14. As Paragraph 14 of the Third Party Complaint incorporates Paragraphs 1 and 3 through 7 of the Third Party Complaint, Third Party Defendant United States incorporates its respective answers thereto.

15. Paragraph 15 of the Third Party Complaint is denied by Third Party Defendant United States except whether this Court has jurisdiction under 46 U.S.C. 740, *et seq.* is a question of law respectfully referred to this Court for determination.

16. Third Party Defendant United States denies each allegation contained in Paragraph 16 of the Third Party Complaint.

17. Third Party Defendant United States denies each allegation contained in Paragraph 17 of the Third Party Complaint.

18. Third Party Defendant United States denies each and every allegation contained in Paragraph 18 of the Third Party Complaint.

19. Third Party Defendant United States denies each allegation contained in Paragraph 19 of the Third Party Complaint.

20. As Paragraph 20 of the Third Party Complaint incorporates allegations contained in Paragraphs 1, 3 through 7, and 15 through 18 of the Third Party Complaint, the Third Party Defendant United States incorporates its respective answers thereto.

21. Third Party Defendant United States denies each allegation contained in Paragraph 21 of the Third Party Complaint.

22. As Paragraph 22 incorporates allegations from Paragraphs 1 and 3 through 5 of the Third Party Complaint, the Third Party Defendant United States incorporates its respective answers thereto.

23. The allegations contained in Paragraph 23 of the Third Party Complaint present questions of law which are respectfully referred to this Court for its determination.

24. Third Party Defendant United States denies the allegations contained in Paragraph 24 of the Third Party Complaint, however, the Third Party Defendant United States admits that the United States entered into Supplemental Agreement 1000 to contract AF 33(657)-15053.

25. In response to the allegations in Paragraph 25 of the Third Party Complaint, the Third Party Defendant United States avers that the contracts numbered AF(657)-15053 and 1000 were some of the operative contracts governing the manufacturing, sales and delivery of the C-5A by Lockheed Airlines, Inc. to the United States. The Third Party Defendant United States denies all other allegations contained in Paragraph 25 of the Third Party Complaint.

26. Third Party Defendant United States denies all allegations contained in Paragraph 26 of the Third Party Complaint.

27. Third Party Defendant United States denies all the allegations contained in Paragraph 27 of the Third Party Complaint.

28. Third Party Defendant United States denies all the allegations contained in Paragraph 28 of the Third Party Complaint.

FIRST DEFENSE

29. The Third Party Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

30. This Court lacks jurisdiction as to the United States in the above-captioned case because of 28 U.S.C. 2680(a), (h) and (k); 5 U.S.C. 8101, *et seq.*, and 5 U.S.C. 8116(c).

THIRD DEFENSE

31. The Third Party Defendant United States and its agents, servants and employees at all times acted with due care.

FOURTH DEFENSE

32. Any alleged acts or omissions on the part of the Third Party Defendant United States and its agents, servants and employees were not the proximate cause of any alleged injury sustained by the plaintiffs.

FIFTH DEFENSE

33. The injuries allegedly sustained by the plaintiffs were due to the negligent acts and/or omissions of others over who the United States had no control.

WHEREFORE, Third Party Defendant United States, demands:

1. Judgment dismissing the Third Party Complaint; and

2. Costs, disbursements, the reasonable value of its attorneys' fees and, such other relief in favor of the United States as this Court deems proper.

EARL J. SILBERT
United States Attorney

By: /s/ Robert W. Katz
ROBERT W. KATZ
Trial Attorney
Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. 75-205

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., 7013 Union Mill Road, Clifton, Virginia 22024, Administrator of the Estate of Ann Bottorff, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

LOCKHEED AIRCRAFT CORPORATION,
a California Corporation,
Defendant and Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant

PRETRIAL ORDER

[Filed Jan. 4, 1979]

A status conference was held on December 15, 1978, at which the Court discussed with counsel the scheduling of this matter. Accordingly, it is this 4th day of January 1979, hereby

ORDERED: That the parties shall comply with the following schedule of pretrial proceedings:

1. All discovery shall be completed on or before July 15, 1979. During discovery the Court is available on

motion of either party with short notice to assist the parties in resolving disputes regarding discovery.

2. Cut-off of discovery shall terminate all methods of discovery listed in Fed. R. Civ. P. 26(a). The cut-off shall preclude any action by a party or counsel, such as the noticing of a new or an additional expert witness, which would require the opposing party to seek further discovery.

3. Motions to dismiss or for summary judgment, if any, shall be filed prior to termination of discovery. Local Rule 1-9 governs such motions and responses to them, and shall be strictly observed. In the event that any such motions are filed, a hearing on them will be held on a date to be scheduled, in Courtroom No. 4, U.S. Courthouse, Washington, D.C.

4. After the Court has ruled on any motions, and, in any event, before July 20, 1979, counsel for the parties shall meet at mutually convenient times and places to exchange copies and premark originals of exhibits that they intend to offer at trial. After exchanging and examining the exhibits, counsel shall prepare a joint statement listing and briefly describing the exhibits to be offered. The joint statement about exhibits shall note agreement or lack thereof as to the admissibility, relevancy, and authenticity of the exhibits. The parties shall attach to the joint statement about exhibits a joint appendix containing not more than 30 pages of copies, or excerpts from, the most meaningful exhibits.

During this process counsel shall also prepare a joint statement of issues about which there is a genuine controversy and a stipulation of material facts not in dispute.

The joint statement describing the exhibits (with copies of excerpts from key documentary exhibits not exceeding 30 pages total attached as an appendix), the joint statement of issues, and the stipulation of facts

not in dispute shall be filed with the Clerk on or before July 25, 1979.

5. Plaintiff shall file with the Clerk and serve a pretrial brief in response on or before August 10, 1979, and defendant shall file and serve a pretrial brief in response on or before August 31, 1979. The pretrial brief of each party shall include as separately titled and numbered sections:

(a) A list of the witnesses that the party intends to call, a brief summary of the testimony expected from each, and the estimated time required for that testimony.

(b) A statement of all facts proposed to be proven, set forth in simple, declarative sentences, separately numbered. With each statement of fact there shall be set forth in parentheses the names of witnesses, and the identified portions of depositions, pleadings, exhibits, or other documents to be introduced in proof of such fact.

(c) A statement of the legal contentions necessary to establish the party's claim or defense. Such contentions shall be individually, clearly, and concisely stated in separately numbered paragraphs. With each paragraph there shall be set forth in parentheses citation to legal authorities supporting the legal contention asserted, with an asterisk preceding each authority principally relied upon. The relevant text of any statute or regulation principally relied upon shall be set out in full in an appendix.

(d) A narrative argument of the law and facts supported by authorities.

(e) If either party has demanded trial by jury, each shall attach as appendices to the pretrial brief:

(i) A proposed list of questions to be asked of the jury panel by the Court in *voir dire* examination.

(ii) A preliminary set of proposed instructions to the jury.

(iii) A proffer of stipulated facts which can be read to the jury in lieu of proof by oral testimony or other documentary evidence.

(f) A brief argument on the admissibility, relevancy, and authenticity (with affidavits in support if appropriate) of exhibits insofar as these issues are not resolved by the stipulation required by paragraph 4 above.

6. Defendant shall in addition include in the pretrial brief a response by corresponding number which shall admit, deny, or assert insufficient knowledge or information to either admit or deny each numbered statement of fact set forth in plaintiff's pretrial brief. Each denial shall be supported by appropriate counter-responses. See paragraph 5(b) above. Each assertion of insufficient knowledge shall describe pretrial efforts to obtain the knowledge by discovery, or otherwise.

7. Plaintiff shall on or before September 14, 1979 file any reply to facts affirmatively stated in defendant's response, which shall, by corresponding number, admit, deny, or assert insufficient knowledge or information sufficient to admit or deny each numbered statement of fact set forth in defendant's brief. Such denials shall be supported and assertions of lack of knowledge explained. See paragraph 5 above. If defendant's pretrial brief asserts any new legal issues, such as an affirmative defense or counterclaim plaintiff's reply shall, with respect to these issues only, take the form of a pretrial brief.

8. The Court expects each party to identify and either concede or join every issue of fact or law in the case and show the support, if any, for the position. If either party has any question about its responsibility for compliance with this order, that party should, by motion,

request a conference with the Court in advance of the pretrial conference, with notice of the request to the opposing party or parties.

9. After defendant has filed a pretrial brief, counsel shall consult with each other and attempt to anticipate and resolve all evidentiary issues which are likely to arise during the trial, including for example, the qualification of any expert witnesses listed in the pretrial briefs. Counsel shall prepare and file with the Clerk on or before September 19, 1979 a joint statement listing the evidentiary issues they have discussed and noting their agreement or lack thereof on the proper resolution of these issues. Counsel shall be prepared to argue evidentiary issues on which there is disagreement at the pretrial conference, and may submit memoranda in support of their positions prior to the pretrial conference.

10. If refinement of the facts or issues in the course of discovery or pretrial preparation stimulates interest in a settlement, the Court is available to assist in that process.

11. Any fact, legal contention, claim for relief or defense (in whole or in part), evidentiary objection or affirmative matter not set forth in detail as provided above shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate) in future proceedings, notwithstanding the contents of any pleadings or papers filed in the case, except for matters of which a party could not have been aware in the exercise of reasonable diligence at the time the pretrial brief was filed. Such a showing as to new matter shall be made by motion. If the Court grants the motion, a supplemental brief by leave of Court will be permitted.

12. A pretrial conference has been scheduled for September 26, 1979, in Courtroom No. 4.

13. Counsel shall obtain from the Courtroom Clerk stickers for premarking exhibits and forms for listing

exhibits. The exhibits shall be marked by counsel, and the completed lists of exhibits shall be delivered to the Courtroom Clerk, at least two days prior to trial.

14. Trial shall commence on November 1, 1979, in Courtroom No. 4, to continue through November 30, 1979.

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 75-0205
All Cases

IN RE AIR CRASH DISASTER NEAR SAIGON,
SOUTH VIETNAM ON APRIL 4, 1975

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant

ORDER

[Filed Sept. 10, 1979]

Upon consideration of defendant's Motion to Amend the Pretrial Order and any opposition thereto, it is hereby

ORDERED that the Pretrial Order entered in this action on January 4, 1979 and amended by Order dated June 26, 1979, is hereby further amended as follows:

1. All references to actions to be taken by "counsel" in paragraphs 4 through 9 of the January 4, 1979 Pretrial Order expressly include counsel for plaintiff, defendant and third-party defendant.

2. The pretrial brief of the defendant scheduled to be filed on or before September 24, 1979, shall include in a separate section following the format established in paragraph 5 of the Pretrial Order any contentions which defendant and third-party plaintiff intends to raise with regard to the third-party defendant.

3. Third-party defendant shall file a reply to defendant-third party plaintiff's contentions as to it on or before October 1, 1979 following the format set forth in paragraph 6 of the pretrial order.

4. Defendant and third-party plaintiff's reply to third-party defendant's responses shall be filed on or before October 8, 1979.

5. The joint statement of pretrial issues shall be filed on or before October 10, 1979 instead of October 3, 1979.

6. A pretrial conference will be held on October 12, 1979 at 2:00 p.m. in courtroom number 4, instead of October 5, 1979.

Dated: Sept. 10, 1979

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant

DEFENDANT LOCKHEED AIRCRAFT CORPORATION'S PRETRIAL BRIEF

HAIGHT, GARDNER, POOR & HAVENS
1819 H Street, N.W.
Washington, D.C. 20006
(202) 737-7847

* * * *

DEFENDANT'S STATEMENT OF FACTS PROPOSED TO BE PROVEN AT TRIAL .....

27. The C-5A Contract .....
28. The Request for Proposal .....
29. The Initial Bid Proposal .....
30. After Contract Award .....
31. Concurrent Development and Production.....
32. Various Plans and Analyses .....
33. Design of the Aft Cargo Door System .....
34. Design and Location of the Hydraulic and Flight Control Systems .....
35. Production of AF 68-218 .....
36. Training .....
37. Responsibility for Maintenance .....
38. Preparation of Technical Manual 2-12 .....
39. Air Force Use of the 2-12 Manual .....
40. Air Force Failure to Follow the 2-12 Manual .....
41. Proposal of Special Rigging Training by Lockheed .....
42. Air Force Approval of Only Limited Training .....
43. RFQ 74-3-124 .....
44. Program Depot Maintenance .....
45. C-5A Production Constraints .....
46. Performance of the C-5A .....
47. Cannibalization of Tie Rods .....
48. Last Maintenance Work Performed .....
49. Rapid Decompression .....
50. Improper Rigging of the Aft Ramp Lock System .....
51. Possibility of Ground Fire .....

52. Crew Awareness of a Problem .....
53. Avoidance of the Accident by Unpressurized Flight .....
54. The Proof Test .....
55. Proper Rigging Would Have Avoided the Accident .....
56. Rapid Decompression Over International Waters .....
57. Failure to Follow Cannibalization Regulations .....
58. Assumption of the Risk .....
59. MAC Direction of the Flight .....
60. Investigation of the Accident .....
61. Air Force Control of Parts Supply .....

* * * *

DEFENDANT'S STATEMENT OF FACTS PROPOSED TO BE PROVEN AT TRIAL AS TO PLAINTIFF'S CASE AND AS TO THIRD-PARTY DEFENDANT

This statement of facts which defendant intends to prove is not necessarily in the order which defendant intends to present defendant's case against third-party defendant United States. The order will depend upon, among other factors, the manner and order in which plaintiff puts on his case, the availability of witnesses and trial strategy. Some testimony and exhibits in defendant's case against the third party defendant will be similar to that offered to rebut plaintiff's case against defendant, as stated in Defendant's Response to Plaintiff's Statement of Alleged Facts to be proven at trial. To the extent such testimony and evidence is duplicative, it will not herein be repeated.

In the case of persons listed as witnesses who are expected to testify at trial but who do not testify at trial, defendant reserves the right to use all or portions of the transcripts of their deposition testimony in lieu of live testimony. Persons whom defendant does not expect to testify at trial are designated with an asterisk (*). Lockheed reserves the right to use their live testimony if they appear as witnesses at trial.

The C-5A Contract

27. The C-5A aircraft was designed and manufactured by defendant pursuant to a contract entered into with the United States Air Force after competitive bidding with two other aircraft manufacturers in which Lockheed was determined to be the most qualified and lowest bidder. Under Supplemental Agreement 1000 to the contract, the Air Force is obligated to indemnify Lockheed under circumstances when death or bodily injury occur.

Witnesses:

Norman Appold
Lee Golden
J. M. Ferguson
Harold Howard *
R. M. Morrison
Gen. Willum Spillers *
David Gunson
John Edwards
James Neilson
Gen. Warner Newby *
Vernon Fisher

Exhibits:

D81, D82, D279-D281

The Request for Proposal

28. The Air Force, prior to awarding the contract for the C-5A to Lockheed, issued a request for proposal containing various "design-to" specifications.

Witnesses:

Norman Appold
Lee Golden
J. M. Ferguson
Harold Howard *
R. M. Morrison
Gen. Willum Spillers *
David Gunson
John Edwards
James Neilson
Gen. Warner Newby *
Vernon Fisher

Exhibits:

D81, D82, D89, D90, D94

The Initial Bid Proposal

29. Lockheed submitted a multi-volume initial bid proposal, some of which was later incorporated into the contract.

Witnesses:

Harold Howard *
Lee Golden
J. M. Ferguson
David Gunson
Gen. Warner Newby *
Gen. Willum Spillers *

Exhibits:

None

After Contract Award

30. After the contract was awarded to Lockheed, the Air Force prepared the preliminary test plans; Lockheed prepared the detailed test plans; Lockheed proposed the preliminary design, participated in by the Air Force at Preliminary Design Reviews and subsequently approved by the Air Force; Lockheed proposed the detailed design, participated in by the Air Force during Critical Design Reviews and subsequently approved by the Air Force; Lockheed performed the actual tests on the aircraft during Category I testing and prepared reports thereon, which were subsequently approved by the Air Force; Lockheed and the Air Force conducted joint testing of the C-5A aircraft during Category II testing, and the Air Force conducted the Category III operational testing. The aircraft aft cargo loading system met all tests required by the Air Force.

Witnesses:

Harold Howard *
Gen. Warner Newby *
David Gunson

Gen. Willum Spillers *
Lee Golden
R. M. Morrison
Richard Rouzie
J. M. Ferguson
Norman Appold
John Mackey
C. W. Smith
C. J. Hancock
James Monti
Al Shewmaker
R. W. Smith
Fred Stovall

Exhibits:

D35-D57, D80-D90, D93-D96, D218-D226, D316, D328-D333, D334-D335, D344, D345

Concurrent Development Production

31. The contract called for the concurrent development and production of the aircraft wherein production was commenced while design and development of certain systems was still in progress.

Witnesses:

Norman Appold
Lawrence Kitchen *
Gen. Warner Newby *
David Gunson
J. M. Ferguson
Lee Golden
R. M. Morrison

Exhibits:

D82-D90, D93-D96, D328-D331, D332, D333

Various Plans and Analyses

32. Pursuant to the contract requirements Lockheed prepared a System Safety Engineering Plan, which was modified from time to time, and various tests, reports and analyses pursuant to that plan and performed static, fatigue and endurance testing, Failure Modes Effects Analyses and Reliability Analyses and other studies, reports and analyses on the various aircraft systems to determine whether any changes or modifications were necessary during the production process.

Witnesses:

John Edwards
Gordon Dobson
David Gunson
J. M. Ferguson
R. M. Morrison
Lee Golden
Al Shewmaker
James Monti
John Mackey
Fred Stovall
Norman Appold
C. J. Hancock
William Hoeing
Robert Lamson
R. M. Smith
Al Justice
Jay Arnold
C. W. Smith
Richard Rouzie

Exhibits:

D82, D38, D40, D42-D57, D78-D90, D93-D95, D112-D205, D207-D214, D219-D226, D230-D240, D256, D260-D268, D276, D281, D283-D294, D301, D314, D316, D328-D333

Design of the Aft Cargo Door System

33. Lockheed designed the aft cargo door system and specifically the aft ramp and its locking mechanism for the C-5A in accordance with the "design-to" specifications of the Air Force which dictated the design followed. The design of these systems and subsystems met the state of the art at the time of design.

Witnesses:

David Gunson
Richard Rouzie
Robert Lamson
James Monti
Walter Porter
O. C. Brockington
Lee Golden
R. M. Morrison
Gen. Warner Newby *
Gordon Dobson
Stephen Williamson
W. M. Perry
Gen. Willum Spillers *

Exhibits:

D38-D56, D81-D86, D89, D90, D94, D96, D5, D114-D117, D129-D183, D186-D205, D209, D219-D226, D230-D239, D259-D268, D313, D314, D328-D333, D344, D345

Design and Location of the Hydraulic Lines and Flight Control Systems

34. Lockheed designed the hydraulic and flight control system for the C-5A in accordance with the "design-to" specifications of the Air Force and the design of these systems and related subsystems met the state of the art at the time of design.

Witnesses:

David Gunson
John Edwards
Richard Rouzie
O. C. Brockington
Lee Golden
Robert Lamson
Walter Porter
R. M. Morrison
Gen. Paul Carlton *
Gen. Willum Spillers *
Gen. Warner Newby *

Exhibits:

TT-9, D1, D21, D49, D87-D95, D115-D116, D209, D313, D330, D316

Production of AF68-218

35. AF68-218, the aircraft involved in the accident at issue, herein, was properly manufactured, assembled, tested, inspected and delivered to the Air Force on September 4, 1970.

Witnesses:

John Edwards
David Gunson
Gen. Willum Spillers *
C. J. Hancock
C. W. Smith
R. W. Smith
Al Shewmaker
R. M. Morrison
Ralph Tressel *
Harold Howard *
Gen. Warner Newby *
J. M. Ferguson
Lee Golden

Exhibits:

D33, D38-D57, D82-D85, D89, D90, D93-D97, D219-D226, D230-D239, D259-D268, D283-D294, D332

Training

36. Lockheed was contractually obligated to conduct training initially on the C-5 for a core group of Air Force maintenance personnel and Lockheed performed and completed all its contractual obligations thereunder by 1969; thereafter, the Air Force undertook full responsibility for the training of its personnel, except as specifically contracted for with Lockheed and as agreed to be done by Lockheed through its Field Service Representatives.

Witnesses:

Lee Golden
J. M. Ferguson
R. M. Morrison
Robert Gusdorff *
Gen. Warner Newby *
Col. Ted Clay
MSgt. James Creel *
Neil Harrison
John Mabes
Tom Farr
Jim Adams
Gordon Dobson

Exhibits:

D332, A, L, N-BB, QQ, D4, D6-D10, D17, D25-D32, D76, D77, D82, D89, D90, D94, D101, D102, D114, D213, D216-D218, D240, D241-D248, D256, D298, D308, D343

Responsibility for Maintenance

37. With the delivery of Ship 21 to the Air Force, the responsibility for maintenance of the aircraft, including

parts supply and monitoring the condition of the aircraft shifted to the Air Force commands using the aircraft.

Witnesses:

Lee Golden
J. M. Ferguson
R. M. Morrison
David Gunson
Gordon Dobson
Norman Appold
Marvin Martin
Col. Ted Clay
John Mackey
F. A. Stovall
C. J. Hancock
Robert Gusdorff *
Gen. Warner Newby *

Exhibits:

A, P-JJ, NN, D10, D11, D22, D23, D25-D33, D82, D89, D90, D94, D96, D97, D227, D307, D308, D312

Preparation of Technical Manual 2-12

38. Lockheed, pursuant to military standards and specifications promulgated by the Air Force, prepared drafts of technical manuals for the maintenance of the C-5A, including the forward and aft cargo door systems, which manual became 1C-5A-2-12. The Air Force reviewed and discussed and suggested changes to the draft of this manual at various Prepublication Review Conferences and verified and approved the contents of all revisions and changes to the manual through Revision 5 of 28 June 1972. The pertinent parts of the manual as they pertained to the aft ramp locking system were not changed between the time of verification of these portions of the manual and the date of the accident. Moreover, after that time Lockheed neither orally nor in writing received sugges-

tions from any Air Force personnel that portions of the manual pertinent to this accident be revised as required by AFR 8-2 and the format of the manual.

Witnesses:

William Hoeing
B. W. Justice
Lee Golden
R. M. Morrison
Stephen Williamson
J. M. Ferguson
Gordon Dobson
Neil Harrison
John Mabes
MSgt. James Creel *

Exhibits:

A, L through O-1, W-BB, OO-QQ, D-5, D22, D23, D75, D82-D86, D89, D90, D99, D100, D186-D205, D299, D307, D335

Air Force Use of the 2-12 Manual

39. The portions of the 2-12 Manual pertaining to removal, installation and rigging of components of the aft ramp lock system were clear, readable, reasonably possible to follow and understand by Air Force maintenance personnel properly trained to perform rigging functions on the aft ramp lock system. However, such Air Force personnel were apparently not properly trained and therefore were not using the manual properly and, indeed were apparently deviating from its provisions in the replacement of parts and the rigging of the aft ramp locking system.

Witnesses:

Robert Lamson
David Gunson
Gordon Dobson
William Hoeing

B. W. Justice
MSgt. James Creel *
Sgt. Noah Fields
Mr. William Hell *
Sgt. Larry Van Dyne
Gen. Charles Kuyk *
Lt. Col. Lawrence Uebel *

Exhibits:

A-D, L-O-1, W-II, KK, LL, QQ, CCC,
D4-D9, D11, D17, D22, D23, D86

Air Force Failure to Follow the 2-12 Manual

40. Indeed, various portions of the 2-12 Manual claimed by plaintiff to be unclear, misleading, etc. admittedly did not confuse the Air Force mechanics who incorrectly performed the crucial and fatal maintenance on AF 68-218 in March, 1975. However, these mechanics performed the maintenance work in two stages, and neither the mechanics who installed the components nor the mechanics who subsequently were to perform the job of rigging and verifying the aft cargo door system followed the procedures of the Technical Manual TO 1C-5A-2-12 or TO-00-20-5 or TO 00-20-1 as required by Air Force Regulation AFR 8-2.

Witnesses:

John Edwards
Gordon Dobson
David Gunson
Sgt. Larry Van Dyne
Sgt. Fields
William Hell *
MSgt. James Creel *
Robert Lamson
Col. Ted Clay
Marvin Martin
Russell Gregory *
Lt. Col. Lawrence Uebel *

Exhibits:

A-D, L-O-1, KK, LL, W-II,
D1, D4-D9, D11, D17, D22, D23, D86, D336, D337

Proposal of Special Rigging Training by Lockheed

41. In late 1970 an Intensified Equipment Manager was established for the Cargo Door Systems of the C-5A primarily because of *ground* incidents relating to *operation* and *sequencing* of the aft cargo door system by flight crew personnel. In June, 1971 Lockheed proposed and the Air Force accepted additional contractor Field Training on the rigging of the forward and aft cargo doors of the C-5A at the bases which were assigned C-54 aircraft. As a result of this training effort (Phase I) it was noted that a high degree of cannibalization of parts from C-5A aircraft and numerous misrigging were occurring. Therefore, a proposal was made by Lockheed for a Phase II training program for Air Force personnel in operation and rigging of the C-5 cargo door system. Lockheed forwarded a letter proposal to the Air Force on October 5, 1971 after evaluation by the Air Force and further discussion at subsequent IEM meetings. This proposal was rejected by the Air Force because of cost by letter of 23 March, 1972. It was indicated that the Air Force recognized the need for such training but it had decided to conduct its own training through the Air Training Command. However, such training was not adequately given to the mechanics who were working on the system despite the fact that Maintenance Training was the responsibility of the Air Force and the operating commands.

Witnesses:

Norman Appold
Gen. Charles Kuyk *
David Gunson
Gordon Dobson
Stephen Williamson

Gen. Warner Newby *
Marvin Martin
Tom Farr
MSgt. James Creel *
Robert Gusdorff *
Lt. Col. Lawrence Uebel *

Exhibits:

A-D, L-JJ, KK, LL, OO, QQ, CCC,
D4-D9, D11, D17, D22, D23, D75, D86, D100,
D101, D114

Air Force Approval of Only Limited Training

42. Subsequently, because additional incidents of misrigging were noted throughout the units using the C-5A, probably because the Air Force had not ordered sufficient spare parts for the aircraft, and its own training efforts had not been adequate, in 1972 the Air Force approved a mere $16,000 worth of limited training by several Lockheed personnel for various Air Force maintenance personnel at four Air Force bases to which C-5As were then assigned. Control over the availability of C-5A aircraft on which electrical and hydraulic power was available was in the hands of the Air Force, as were the availability of classrooms and indeed those maintenance personnel who had been and were to be assigned to maintenance of the cargo door systems on C-5As. At all bases to which the Lockheed training personnel traveled, availability of C-5A aircraft with electrical and hydraulic power and classrooms, which were needed to adequately demonstrate rigging procedures was extremely limited. Furthermore, only a few of the mechanics designated for such training showed up for the assigned classes and demonstrations, and none of the mechanics who performed the final maintenance work on the aircraft involved in this accident were at these classes.

Witnesses:

Gordon Dobson
Tom Farr
David Gunson
Lee Golden
Gen. Warner Newby *
MSgt. James Creel *
Gen. Charles Kuyk *
Lt. Col. Lawrence Uebel *
Stephen Williamson
W. M. Perry
Fred Stovall
R. M. Morrison
J. F. Waters
John Mackey

Exhibits:

A-D, L-JJ, KK, LL, NN, OO, QQ, CCC, D4-D9, D11, D17, D22, D23, D75, D86, D100, D101, D114, D227

RFQ 74-3-124

43. Despite this training, the quality of Air Force maintenance on the forward cargo door systems of the C-5A, the lack of spare parts and the cannibalization process continued to result in misrigging of the forward cargo door to the point where a Lockheed design engineer whose area of concern included these systems had noted eight incidents of the forward ramp of the C-5A coming unlocked in flight and he proposed to his supervisors that Lockheed perform a study for the Air Force to identify the source of maintenance problems, the need for possible modifications to provide for a "more misrigging tolerant system" and to determine if the existing rigging documents (Tech Orders) could be simplified. Pursuant to procedures established between Lockheed and the Air Force Logistics Command Engineering Branch at San

Antonio for the submission of unsolicited proposals by Lockheed, his superior approved this proposal and forwarded it to the Air Force in October 1974 as Request for Quotation (RFQ 74-3-124). A similar procedure had also been utilized by the Air Force System Program Office (SPO) at Wright-Patterson prior to the transition of support responsibility from SPO to San Antonio Logistics Command on or about January 1, 1974. The Air Force informed Lockheed in December, 1974, that the Air Force had decided not to accept and fund such a study.

Witnesses:

David Gunson
Gordon Dobson
Vern Hannum
Glen Hollingsworth
Ralph Tressel *
R. M. Morrison
Lee Golden
Marvin Martin
Russell Gregory *
Bill Nelson
General Warner Newby *
Vernon Holzwarth *
MSgt. James Creel *
Robert Gusdorff *
Gen. Charles Kuyk *

Exhibits:

P-V, CC-JJ, NN, D10, D25-D32, D71, D82, D308, D76, D77, D86, D102

Program Depot Maintenance

44. Lockheed adequately performed AF 68-218 Program Depot Maintenance (PDM) at Lockheed's facility in Marietta, Georgia from September, 1974 through December, 1974 and no defects in the aft ramp locking system were discovered during the course of required inspection at that time.

Witness:

C. J. Hancock

Exhibits:

CCC, D228, D229, D257, D258, D295, D341, D342

C-5A Production Constraints

45. Without waiving its objection to the relevancy of such testimony, defendant intends to prove that the C-5A was the most versatile, complex, sophisticated cargo aircraft ever designed and manufactured and many complex problems, including financial problems, developed during the design, manufacture, assembly, testing and operation of the C-5 including the discovery that the expected wing life of the aircraft would probably not meet the goal of 30,000 flying hours. These problems were exacerbated by the requirement for concurrent development and production; the Air Force's emphasis on the total package procurement fixed price contract approach; the Air Force's refusal to accept changes such as higher thrust engines and aircraft runway length requirements; the requests for numerous changes during development, production and testing phases; and the Air Force's decision to exercise only part of its option for a second production run of C-5A aircraft.

Witnesses:

L. O. Kitchen *
Lee Golden
R. M. Morrison
Richard Rouzie
Robert Lamson
J. M. Ferguson
Norman Appold
James Neilson
David Gunson
Gen. Warner Newby *
Jack Catton *

Exhibits:

None

Performance of the C-5A

46. Nevertheless, the C-5A has performed brilliantly on routine and extraordinary operational missions and particularly in connection with the Vietnam and Israeli airlifts.

Witnesses:

Norman Appold
Gen. Paul Carlton *
Gen. Warner Newby *
Gen. Willum Spillers *
Gen. James Marshall *
General Kuyk *
Jack Catton *

Exhibits:

D279-D281

Cannibalization of Tie Rods

47. On March 16, 1975, Air Force maintenance personnel at Travis Air Force Base removed nos. 2 and 3 tie rods from the right hand side of the aft ramp of AF 68-218 in a process known as cannibalization, a procedure whereby parts are removed from one aircraft and installed on another aircraft to restore the second aircraft to operational service. This was often done to facilitate a Military Airlift Command (MAC) policy to fly every C-5A at least once every 20 days. Cannibalization occurred because of MAC failure to keep adequate and necessary parts in supply at the C-5 home bases, such as Travis AFB. On March 24, 1975, other maintenance personnel installed other tie rods in the nos. 2 and 3 tie rod positions of the aft ramp of AF68-218. However, after installing the tie rods, the Air Force mechanics failed to

properly rig the aft ramp locking system in accordance with the applicable Technical Manual TO 1C-5A-2-12, and other applicable Technical Orders, as required by AFR 8-2.

Witnesses:

John Edwards
Gordon Dobson
Sgt. Noah Fields
Mr. William Hell *
Sgt. Larry Van Dyne
General Warner Newby *
Richard Rouzie
Robert Lamson
Marvin Martin
Russell Gregory *
Col. Ted Clay
Sgt. James Creel *
Col. Robert Ingram *
Lt. Col. Lawrence Uebel *
Robert Gusdorff *
J. F. Waters

Exhibits:

A-E, O, O-1, P-V, KK, LL, NN, CCC

D1, D4-D9, D11-D13, D17, D59-61, D68, D71, D86, D227, D282, D300, D315, D334, D336, D337

Last Maintenance Work Performed

48. The last maintenance work performed on the aft ramp lock system of AF 68-218 was that performed at Travis AFB on March 29, 1975. Thereafter, the aircraft left Travis AFB on April 1, 1975, flew to Warner-Robbins AFB in Georgia on-loaded 45.9 tons of howitzers and then flew to Saigon, South Vietnam with intermediate stops at Travis AFB, Hickam AFB in Honolulu, Anderson AFB in Guam and Clark AFB in the Philippines. The maximum altitudes reached on prior flight legs were as follows:

Leg	*Date*	*Feet*
Travis to Warner Robbins AFB	4/1/75	33,090
Warner Robbins AFB to Travis AFB	4/1/75	30,978
Travis AFB to Hickam AFB	4/2/75	30,978
Hickam AFB to Anderson AFB	4/2/75	30,978
Anderson AFB to Clark AFB	4/3/75	30,978
Clark AFB to Saigon	4/4/75	30,978
Saigon to Saigon	4/4/75	23,424

The aircraft arrived in Saigon at 12:51 (Vietnam time) on April 4, 1975 and immediately discharged its cargo. Thereafter, it was immediately reloaded with 316 passengers, of whom approximately 241 were Vietnamese orphans and took off at 16:03 (Vietnam time) on April 4, 1975 only three hours after arrival.

Witnesses:

Capt. Dennis Traynor
John Edwards
Ken Peck
William Wall
Gen. Warner Newby*
Marcia Wirtz Tate*
Harriet Goffinet Neal*

Exhibits:

G, H, I, D2, D103, D104, D215, D300, D315

Rapid Decompression

49. Ship 68-218 proceeded to Vung Tau marker beacon and passed the beacon at 4:12 p.m. (Vietnam time) at an air speed of 254 knots on a heading of 135°. At 4:15 p.m. (Vietnam time) when the aircraft was more than 12 miles out over the South China Sea, as it was passing through approximately 23,000 feet altitude, locks 1, 2 and 3 of the right hand side of the aft ramp lock system, which were either unlocked or not in the overcenter position, dropped whatever load they were carrying and began the failure sequence detailed in the Engineering Analysis of Data from AF 68-218 (Tab T to the Aircraft Accident Report—Trial Exhibit D1) which severed the hydraulic lines and control cables running to the T-tail

of the aircraft, resulting in loss of pitch and rudder control of the aircraft.

Witnesses:

John Edwards
Gordon Dobson
Dave Gunson
Ken Peck
Gen. Warner Newby*
Col. Ted Clay
Lt. Col. Lawrence Uebel*
Richard Rouzie
Robert Lamson
Maj. Dennis Traynor
Maj. Russell Gregory*
Marvin Martin
W. B. Blanton

Exhibits:

B-J, VV-CCC, D1-D8, D17, D20, D21, D24, D34-D37, D39-D56, D59-61, D68, D86, D91, D92, D103-D105, D107-D111, D215, D300, D303-305, D311, D312, D315, D317, D326, D327

Improper Rigging of the Aft Ramp Lock System

50. The Air Force mechanics' failure to properly rig the aft ramp lock system on Ship 21 resulted in incomplete locking of the aft ramp locking system in Saigon, South Vietnam on April 4, 1975 since no maintenance was performed after the aircraft left Travis. The misrigging most probably occurred because of the adjustment of no. 2 and 3 tie rods too long between locks No. 2 and 3 and locks No. 3 and 4, the installation of a homemade tie rod of insufficient strength or length, or the failure to safety wire or cotter key the nut on one of the ends of either no. 2 or 3 tie rods on the right side of the aft ramp lock mechanism.

Witnesses:

David Gunson
John Edwards

Gordon Dobson
Marvin Martin
W. B. Blanton
MSgt. James Creel*
Robert Gusdorff*
R. W. Smith
Russell Gregory*
Col. Ted Clay
Gen. Warner Newby*
Harold Howard*
Richard Rouzie
Robert Lamson
W. B. Blanton

Exhibits:

A-E, J, KK-MM, VV-CCC, D1-D8, D11, D17, D19-D21, D24, D34-D37, D39, D51-D56, D59-D61, D68, D86, D103, D104, D107-D110, D300, D303-D305, D311, D315, D326-D327, D334, D336, D337

Possibility of Ground Fire

51. Another possible cause of the aft ramp locking system coming unlocked was that a part or parts of the aft ramp lock system was struck by ground fire upon or shortly after take-off, damaging one or several parts of the tie rods, which may or may not have been properly rigged, causing locks nos. 1, 2 and 3 on the right side to come unlocked and triggering the failure sequence described in the Engineering Analysis of Data from AF 68-218 (Tab T to the Aircraft Accident Report) which resulted in the severing of the hydraulic lines and control cables running to the T-tail of the aircraft, resulting in loss of pitch and rudder control to the aircraft.

Witnesses:

Gordon Dobson
Capt. Dennis Traynor
John Edwards
Col. Ted Clay

Gen. Warner Newby*
Marvin Martin*
Russell Gregory*
Robert Lamson
Richard Rouzie
DAO Witness

Exhibits:

E-1, MM, D1, D2, D21, D24, D68, D86, D300, D315

Crew Awareness of a Problem

52. Air Force flight crew personnel had some knowledge of a possible problem with the aft ramp lock system prior to takeoff because they discussed the possibility of a rapid decompression occurring on the aircraft and knew or should have known that a problem with complete locking of the system would result in possible loss of life to one or more crewmembers or passengers. Furthermore, testimony indicates that the loadmasters had to resort to the use of the manual override function of the aft ramp cargo complex in order to close the aft ramp and pressure door in Saigon thereby indicating some malfunction. Furthermore, after the aft cargo ramp and pressure door were closed, a door open light was noted in the cockpit. Despite the fact that this occurred, the loadmasters either failed to check the aft ramp locks, mechanical indicators and electrical indicators, or failed to see what was there to be seen with respect to an indication that one or more locks on the right hand side were not locked.

Witnesses:

John Edwards
Gordon Dobson
Gen. Warner Newby*
Col. Ted Clay
Russell Gregory*

Marvin Martin
Harold Howard*
Lt. Col. Lawrence Uebel*
Capt. Dennis Traynor
Ken Peck (CDPIR Witness)
Gen. Paul Carlton*

Exhibits:

E, I, D1, D2, D5, D11, D74, D86, D104, D105, D107, D108, D215, D300, D315, D334

Avoidance of the Accident By Unpressurized Flight

53. Had the pilot elected to fly the aircraft unpressurized from Saigon to Clark Air Force Base, given the warning of the possible incomplete locking of the aft cargo door system, the accident would not have occurred. Furthermore, although pailetized passenger seating kits were available at Travis Air Force Base which included seatbelts, oxygen masks and life jackets for use where passengers were to be carried on the cargo deck, these were not used. Indeed, passengers including infants and adults were seated on the floor of the cargo deck and strapped down with cargo straps. Sufficient life support equipment (oxygen, life jackets, life rafts) was not available for such passengers, thereby violating AFR 60-16 (Exhibit D309). Indeed, due to the lack of adequate restraining belts and equipment of the 149 passengers and two crewmembers in the cargo compartment only 8 survived. Also, 152 passengers and 7 medical crew members were carried in the troop compartment which had seats and oxygen equipment for only 75 passengers. Some passengers did not have seats or seatbelts and the number of passengers exceeded the number of oxygen masks, life jackets and life rafts available. Nevertheless, of the 159 passengers and crew in the troop compartment all but 3 survived, indicating the excellent survivability of the aircraft. All 11 of the crewmembers in the upper crew deck also survived. The only fatalities in the troop compartment were as to per-

sons without seatbelts or restraining equipment. However, of the 149 passengers in the cargo compartment, only 8 survived. If palletized seating had been used, the likelihood of death would have been minimized. The Air Force had palletized seating kits for the cargo compartment but they were not used in this aircraft.

Witnesses:

Gordon Dobson
R. W. Smith
Al Shewmaker
Capt. Dennis Traynor
Marcia Wirtz Tate*
Harriet Goffinet Neil*
Gen. Paul Carlton*
David Gunson
Robert Lamson
Richard Rouzie
Gen. Warner Newby*
Harold Howard*
John Edwards
Lt. Col. Lawrence Uebel*
Russell Gregory*
Col. Ted Clay

Exhibits:

A, E-I, KK, MM, TT-12, D1, D2, D72, D80, D104, D105, D112, D300, D309, D315

The Proof Test

54. There was no competent evidence that the accident resulted from structural or stress corrosion failure of a tie rod, bellcrank or other component, and there was no evidence prior to the accident that any structural problem existed as to the aft ramp locking system. Indeed, testing by Lockheed before the accident and in connection with the investigation indicated that failure of component parts was not the cause of the accident.

Witnesses:

Ken Peck
Al Shewmaker
C. J. Hancock
Russell Gregory*
Harold Howard*
Marvin Martin
Col. Ted Clay
Gen. Warner Newby*
John Edwards
David Gunson
Gordon Dobson
R. W. Smith
Richard Rouzie
General Paul Carlton*

Exhibits:

B-D, J, LL, NN, VV-ZZ, BBB, D1, D19, D24, D36, D37, D39-D48, D52-D56, D86, D103, D215, D230-D240, D259-D268, D283-D294, D300, D315, D326, D327, D334

Proper Rigging Would Have Avoided the Accident

55. An Air Force mechanic who properly followed the Technical Manual 1C-5A-2-12 in accordance with AFR 8-2 would have properly rigged the aft ramp lock system and the accident would have been avoided.

Witnesses:

Gordon Dobson
MSgt. James Creel*
John Edwards
Sgt. Noah Fields
Marvin Martin
Russell Gregory*
Gen. Warner Newby*
Col. Ted Clay
Robert Lamson

Exhibits:

A-D, LL, ZZ, BBB, CCC

D1, D2, D4-D8, D17, D21, D24, D35-D37, D39, D54-D56, D68, D86, D300, D315

Rapid Decompression Over International Waters

56. The rapid decompression, loss of the pressure door, aft ramp and pitch and rudder controls to AF 68-218 occurred more than 12 nautical miles from the coast of South Vietnam over the South China Sea which the aircraft was enroute from Saigon to Clark AFB in the Philippines and ultimately to the United States.

Witnesses:

Russell Gregory*
Capt. Dennis Traynor
John Edwards
Ken Peck

Exhibits:

I, AAA, D1, D2, D104, D111, D300, D315

Failure to Follow Cannibalization Regulations

57. In removing and installing tie rods between locks 2 and 3 and 3 and 4 on the right side of the aft ramp locking system, the Air Force failed to abide by its own regulations regarding cannibalization. Had the regulations been complied with, the tie rods would not have been removed and replaced, misrigging would not have occurred and the accident would not have happened.

Witnesses:

Gen. Warner Newby*
Gen. Paul Carlton*
John Edwards
Gordon Dobson
Richard Rouzie

Robert Lamson
Sgt. Noah Fields
Mr. William Hell*
Lt. Col. Lawrence Uebel*
Sgt. Lary Van Dyne
Russell Gregory*
MSgt. James Creel*
Gen. Charles Kuyk*

Exhibits:

A-D, P-V, CC-II, NN, CCC, D1, D2, D4-D8, D11, D17, D20, D86, D98, D300, D315

Assumption of the Risk

58. Plaintiff's decedent assumed the risk of injury or death by working in Saigon under wartime conditions and staying until the city was in a state of chaos and departing this area in a time of emergency and danger by boarding AF 68-218 and traveling in the cargo compartment of a military aircraft without seats, seat belts, etc.

Witnesses:

Gen. Warner Newby*
Capt. Dennis Traynor
Marcia Wirtz Tate*
Harriet Goffinet Neil*
John Edwards
DAO witness

Exhibits:

D318, D319

MAC Direction of the Flight

59. The flight of this particular aircraft was ordered either from MAC Headquarters 22nd Air Force in Bellville, Illinois or by the Commanding Officer of the 60th Military Airlift Wing at Travis Air Force Base.

Witnesses:

Capt. Dennis Traynor
Gen. Paul Carlton*
Gen. Warner Newby*

Exhibits:

I, D2, D308, D315

Investigation of the Accident

60. Lockheed adequately conducted investigations of military accidents under its System Safety Plan wherein the Air Force retained primary jurisdiction to investigate military accidents and wherein Lockheed provided *all* necessary support and assistance as requested by the Air Force. Furthermore, in the course of the investigations of this accident by the Air Force under AFR 127-4 Lockheed was asked to provide technical assistance as well as to furnish several engineers as technical advisors to the Aircraft Accident Investigation Board and Lockheed provided such services and advisors. In the course of these activities it was learned by the Lockheed support personnel that the Air Force was not providing Lockheed with copies of all incident reports relative to the aft cargo door system, including a report of the incident involving Ship 061 at Dover AFB in February, 1975. No follow up communication on this incident was initiated and information about this incident was not delivered to Lockheed until after the Saigon accident.

Witnesses:

Jay Arnold
John Edwards
Gordon Dobson
David Gunson
Al Justice
Dick Estey
R. D. Irvine
R. C. Campbell

T. D. Alexander
Marvin Martin
Gen. Warner Newby*
Col. Ted Clay

Exhibits:

D12, D13, D15, D16, D18, D20, D58-D64, D68, D69, D79, D206, D346-D348

Air Force Control of Parts Supply

61. Lockheed depended upon the Air Force to inform it of operational problems and problems related to maintenance, parts supply, and reports of incidents for the C-5A because after delivery of the aircraft it could only provide assistance or recommend training based upon information provided it by the Air Force and also if approved by the Air Force Systems Program Office or after transition of responsibility in 1974, by the Air Force Logistics Command. Although Lockheed had access to the Air Force 66-1 Maintenance Data Bank, the Air Force was responsible for the input of information. There was insufficient information in that data system to warn Lockheed of worn or defective parts of the aft ramp lock system or the frequent replacement of tie rods. Moreover, components of the aft ramp locking system were not "sole source procurement" items and accordingly Lockheed was neither responsible for nor in a position to monitor the frequency or total amount of purchase from other vendors of spare parts for the aft ramp lock system. Air Force procurement records indicate that purchase of the rods from any source prior to the Saigon accident were few and infrequent although the maintenance records for AF 68-218 alone just before the Saigon accident indicate a pattern of heavy cannibalization of aft ramp tie rods. Thus, the Air Force failed to purchase sufficient parts to appropriately limit cannibalization of the rods. Had it done so, this accident would have been prevented. Moreover, by 1974 the Air Force had elected

to discontinue automatic reporting of incidents and maintenance problems through the Unsatisfactory Report System but instead only selectively referred matters to Lockheed. For example, the unlocking of the locks in flight in the aft ramp of Ship 61 in February, 1975 was never reported to Lockheed and not until after the Saigon accident did Lockheed hear of it. In failing to provide such information to Lockheed the Air Force abrogated to itself the responsibility for maintenance and monitoring of maintenance for the C-5A.

Witnesses:

Fred Stovall
John Mackey
Robert Gusdorff*
J. F. Waters
Dick Estey
R. D. Irvine
R. C. Campbell
T. D. Alexander
David Gunson
Jay Arnold
Al Justice
Col. Ted Clay
Gen. Warner Newby*
John Edwards
Marvin Martin
C. J. Hancock
C. W. Smith

Exhibits:

A-D, P-V, CC-JJ, NN, CCC, DDD

D1-D8, D10, D11, D15-D18, D20, D25-D32, D71, D96, D98, D109, D110, D113, D206, D216-D218, D227, D241-D248, D295, D299, D307

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 75-0205

All Cases
IN RE AIR CRASH DISASTER NEAR SAIGON,
SOUTH VIETNAM ON APRIL 4, 1975

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of Ann Nash Bottorff,
Plaintiff,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

ORDER

[Filed Oct. 3, 1979]

Upon consideration of Third-Party Defendant's Motion to Amend the Pre-trial Order, it is hereby ORDERED that the Pre-Trial Order in this action of January 4, 1979, as amended, is further amended as follows:

Third-Party Defendant shall file with the Clerk and serve a Pre-Trial Brief in response to Defendant's Pre-Trial Brief on or before October 5, 1979, and Defendant

shall file and serve a response thereto on or before October 12, 1979.

Date: October 2, 1979.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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All Cases

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Plaintiff,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

THIRD-PARTY DEFENDANT UNITED STATES OF AMERICA'S PRE-TRIAL BRIEF

ALICE DANIEL
Acting Assistant Attorney General

CARL RAUL
Acting United States Attorney

By: /s/ James P. Piper
JAMES P. PIPER
Aviation Trial Attorney
Torts Branch, Civil Division
Department of Justice
Washington, D.C. 20530
Telephone: 202-724-5746

Of Counsel:
FRANCIS B. VAN NUYS
Deputy Chief
Claims & Torts Litigation U.S. Division
HQUSAF/JAG
Washington, D.C. 20324

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* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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All Cases

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Plaintiff,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

THIRD-PARTY DEFENDANT'S RESPONSE TO DEFENDANTS' STATEMENTS OF ALLEGED FACTS

Third-Party Defendant United States of America will not introduce evidence with respect to substantive allegations made by Defendant Lockheed Aircraft Corporation in its Third-Party Complaint. This decision has been made subsequent to extensive depositions of government and Lockheed witnesses and review of many thousands of documents.

Third-Party Defendant will, however, respond to certain legal contentions of Defendant. As to these legal contentions, and the facts which must be proven relative

to each, Third-Party Defendant intends to produce live witnesses and introduce deposition testimony.

Listed below are the proposed alleged facts relative the Third-Party Complaint to which Third-Party Defendant United States takes issue along with witnesses and exhibits be introduced relative thereto.

1. *The C-5A Contract.*

Third-Party Defendant admits that the C-5A aircraft was designed and manufactured by Defendant pursuant to a contract entered into with the United States Air Force after competitive bidding. Third-Party Defendant denies that supplemental agreement 1000 to the contract obligates the Air Force to indemnify Lockheed under circumstances when death or bodily injury occur. Further, this Court has no jurisdiction to consider contract claims involving the United States and its contractors. Such claims must, by statute, be presented to the Armed Forces Board of Contractor Appeals, then, if necessary to the United States Court of Claims.

Witnesses:

Mrs. Lucile Schlosser

Exhibits:

None

2. *Death on the High Seas Act.*

Third-Party Defendant denies that the accident which forms the basis for the litigation herein had sufficient significant traditional maritime contacts as to allow this Court to use as the basis for jurisdiction admiralty law or specifically the Death on the High Seas Act, 46 U.S. 761, *et seq.* Third-Party Defendant will show that (1) the flight originated on land; (2) the flight was destined to a land based airfield; (3) the forced landing occurred on land; (4) no negligence occurred other than on land;

and (5) all injuries resulting in the death of Plaintiff's decedent occurred on land.

Witnesses:

Colonel Ted N. Clay
Harriett Goffinett Neal
Russell B. Raymon
Marsha Wirtz Tate
Dennis Traynor
Gordon A. Dobson
John Edwards
David O. Gunson
Charles E. Lovelace, Jr.

Exhibits:

Deposition Exhibits 36, 44, 97, 126a, 126b, 126c, KK, LL, MM, VV, WW, YY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiff,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

DEFENDANT LOCKHEED AIRCRAFT CORPORATION'S MOTION FOR SUMMARY JUDGMENT

[Received Nov. 19, 1979]

Defendant and third-party plaintiff Lockheed Aircraft Corporation hereby moves this Court pursuant to Rule 12(f) and 56 (a) of the Federal Rules of Civil Procedure for an Order striking all affirmative defenses raised by the third-party defendant and thereupon granting summary judgment in favor of defendant and third-party plaintiff and awarding defendant and third-party plaintiff indemnity herein, under the stipulated facts in this action, on the grounds set forth in the accompanying Memorandum of Points and Authorities, and for such other and further relief as the Court may deem just and proper.

Dated: Washington, D.C.
November 19, 1979

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third-Party Plaintiff
Lockheed Aircraft Corporation

By /s/ Carroll E. Dubuc
CARROLL E. DUBUC
1819 H Street, N.W.
Suite 1050
Washington, D.C. 20006
(202) 737-7847

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 75-0205
All Cases

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LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

MOTION OF THIRD-PARTY DEFENDANT UNITED STATES OF AMERICA TO DISMISS

Third-Party Defendant, United States of America, pursuant to Rule 12, of the Federal Rules of Civil Procedure, respectfully moves this Court dismiss the Third-Party Complaint against the United States of America due to the death of Ann Nash Bottorff on the ground that the Court is without jurisdiction, in that the Plaintiff's decedent's death occurred incident to her federal employment and that recovery under the Federal Tort

Claims Act in such instances is precluded by the exclusivity provisions of the Federal Employees' Compensation Act, 5 U.S.C. § 8116 and the line of cases cited in the Memorandum of Points and Authorities attached hereto.

WHEREFORE, Third-Party Defendant, United States of America, moves this Honorable Court to enter an order dismissing this action against the United States of America based upon the death of Ann Nash Bottorff, and for such other, further and different relief which, to the Court, may be just and proper.

Respectfully submitted,

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CARL RAUL
Acting United States Attorney

By: /s/ James P. Piper
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiff,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

DEFENDANT/THIRD-PARTY PLAINTIFF LOCKHEED AIRCRAFT CORPORATION'S AND THIRD-PARTY DEFENDANT UNITED STATES' JOINT STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(h) of the Local Rules of this Court, defendant-third party plaintiff Lockheed Aircraft Corporation (hereinafter "Lockheed") and third party defendant United States join in the following statement of material facts as to which there is no genuine issue with respect to third party defendant United States' motion for summary judgment and defendant-third party plaintiff Lockheed's cross motion for summary judgment as to Lockheed's third party claim against the United States in *Thomas* v. *Lockheed Aircraft Corporation*:

1. The C-5A aircraft was designed and manufactured by defendant pursuant to a contract entered into with

the United States Air Force after competitive bidding with two other aircraft manufacturers in which Lockheed was determined to be the most qualified and lowest bidder.

2. The Air Force, prior to awarding the contract for the C-5A to Lockheed, issued a request for proposal containing various "design-to" specifications.

3. Lockheed submitted a multi-volume initial bid proposal, some of which was later incorporated into the contract.

4. After the contract was awarded to Lockheed, the Air Force prepared the preliminary test plans; Lockheed prepared the detailed test plans; Lockheed proposed the preliminary design, participated in by the Air Force at Preliminary Design Reviews and subsequently approved by the Air Force; Lockheed proposed the detailed design, participated in by the Air Force during Critical Design Reviews and subsequently approved by the Air Force; Lockheed performed the actual tests on the aircraft during Category I testing and prepared reports thereon, which were subsequently approved by the Air Force; Lockheed and the Air Force conducted joint testing of the C-5A aircraft during Category II testing, and the Air Force conducted the Category III operational testing. The aircraft aft cargo loading system met the requirements of the Category III testing conducted by the Air Force.

5. The contract called for the concurrent development and production of the aircraft wherein production was commenced while design and development of certain systems was still in progress.

6. Pursuant to the contract requirements Lockheed prepared a System Safety Engineering Plan, which was modified from time to time, and various tests, reports and analyses pursuant to that plan and performed static, fatigue and endurance testing, Failure Modes Effects

Analyses and Reliability Analyses and other studies, reports and analyses on the various aircraft systems to determine whether any changes or modifications were necessary during the production process or subsequent thereto.

7. Lockheed designed the aft cargo door system and specifically the aft ramp and its locking mechanism for the C-5A in accordance with the "design-to" specifications of the Air Force which dictated the design followed. The design of the aft cargo door system of the C-5A and specifically the aft ramp and its locking mechanism met the state of the art at the time of design.

8. Lockheed designed the hydraulic and flight control system for the C-5A in accordance with the "design-to" specifications of the Air Force and the design of these systems and related subsystems met the state of the art at the time of design.

9. AF68-218, the aircraft involved in the accident at issue herein, was manufactured, assembled, tested, inspected and delivered to the Air Force on September 4, 1970 in accordance with the contract.

10. Lockheed was contractually obligated to conduct training initially on the C-5A for a core group of Air Force maintenance personnel and Lockheed performed and completed all its contractual obligations thereunder by 1969; thereafter, the Air Force undertook full responsibility for the training of its personnel, except as specifically contracted for with Lockheed and as agreed to be done by Lockheed through its Field Service Representatives.

11. With the delivery of AF 68-218 to the Air Force, the responsibility for maintenance of the aircraft, including parts supply and monitoring the condition of the aircraft shifted to the Air Force commands using the aircraft.

12. Lockheed, pursuant to military standards and specifications promulgated by the Air Force, prepared drafts of technical manuals for the maintenance of the C-5A, including the forward and aft cargo door systems, which manual became Technical Order 1C-5A-2-12. The Air Force and Lockheed reviewed and discussed and suggested changes to the draft of this manual at various Prepublication Review Conferences and the Air Force verified and approved the contents of all revisions and changes to the manual through Revision 5 of 28 June 1972. The pertinent parts of the manual as they pertained to the aft ramp locking system were not changed between the time of verification of these portions of the manual and the date of the accident. Moreover, after that time Lockheed received no written suggestions from any Air Force personnel pursuant to AFR 8-2 that portions of the manual pertinent to this accident be revised.

13. The portions of the 2-12 Manual pertaining to removal, installation and rigging of components of the aft ramp lock system were clear, readable, reasonably possible to follow and understand by Air Force maintenance personnel properly trained to perform rigging functions of the aft ramp lock system. However, such Air Force personnel may not have been properly trained and therefore may not have used the manual properly and, indeed may have deviated from its provisions in the replacement of parts and the rigging of the aft ramp locking system.

14. Indeed, various portions of the 2-12 Manual claimed by plaintiff to be unclear, misleading, etc. apparently did not confuse the Air Force mechanics who incorrectly performed the crucial and fatal maintenance on AF 68-218 in March, 1975; however, these mechanics performed the maintenance work in two stages, and neither the mechanics who installed the components nor the mechanics who subsequently were to perform the job of rigging and verifying the aft cargo door system fol-

lowed all of the procedures of the Technical Manual TO 1C-5A-2-12 or TO-00-20-5 or TO 00-20-1 as required by Air Force Regulation AFR 8-2.

15. In late 1970 an Intensified Equipment Manager was established for the Cargo Door Systems of the C-5A primarily because of *ground* incidents relating to *operation* and *sequencing* of the aft cargo door system by flight crew personnel.

16. In June, 1971 Lockheed proposed and the Air Force accepted additional contractor Field Training on the rigging of the forward and aft cargo doors of the C-5A at the bases which were assigned C-5A aircraft, as a result of which training effort (Phase I) it was noted that a high degree of cannibalization of parts from C-5A aircraft and numerous misrigging were occurring.

17. In September, 1971 a proposal was made by Lockheed for a Phase II training program for Air Force personnel in operation and rigging of the C-5A cargo door system, which proposal Lockheed forwarded by letter to the Air Force on October 5, 1971 after evaluation by the Air Force and further discussion at subsequent IEM meetings.

18. The October 5, 1971 training proposal was rejected by the Air Force by letter of 23 March, 1972, which indicated that the Air Force recognized the need for such training but had decided to conduct its own training through the Air Training Command. Such subsequent training by the Air Training Command may not adequately have been given to the mechanics who were working on the system pursuant to normal Air Force training procedures.

19. Subsequently, because additional incidents of misrigging were noted throughout the units using the C-5A, possibly because the Air Force had not ordered sufficient spare parts for the aircraft, and its own training efforts had not been adequate, in 1972 the Air Force approved

$16,000 worth of training by several Lockheed personnel for various Air Force maintenance personnel at four Air Force bases to which C-5As were then assigned. Control over the availability of C-5A aircraft on which electrical and hydraulic power was available was in the hands of the Air Force, as were the availability of classrooms and indeed those maintenance personnel who had been and were to be assigned to maintenance of the cargo door systems on C-5As. At some bases, including Travis AFB, to which the Lockheed training personnel traveled, availability of C-5A aircraft with electrical and hydraulic power and classrooms, which were needed to adequately demonstrate rigging procedures was limited. Furthermore, only a few of the mechanics designated for such training were present for the assigned classes and demonstrations, and attendance lists for Travis AFB do not reflect that the mechanics who performed the final maintenance work on the aircraft involved in this accident were at these classes.

20. Despite subsequent training, the quality of Air Force maintenance on the forward cargo door systems of the C-5A, the lack of spare parts and the cannibalization process continued to result in misrigging of the forward ramp to the point where a Lockheed design engineer whose area of concern included these systems had noted eight incidents of the forward ramp of the C-5A coming unlocked in flight and he proposed to his supervisors that Lockheed perform a study for the Air Force to identify the source of maintenance problems, the need for possible modifications to provide for a "more misrigging tolerant system" and to determine if the existing rigging documents (Tech Orders) could be simplified.

21. Pursuant to procedures established between Lockheed and the Air Force Logistics Command Engineering Branch at San Antonio for the submission of unsolicited proposals by Lockheed, the above mentioned Lockheed engineer's superior approved this proposal and forwarded

it to the Air Force in October 1974 as Request for Quotation (RFQ) 74-3-124; similar procedures had also been utilized by the Air Force System Program Office (SPO) at Wright-Patterson Air Force Base prior to the transition of support responsibility from SPO to San Antonio Logistics Command on or about January 1, 1974.

22. The Air Force informed Lockheed in December, 1974 that the Air Force had decided not to accept and fund the proposal contained in RFQ 74-3-124.

23. Lockheed performed Program Depot Maintenance (PDM) on AF 68-218 at Lockheed facility in Marietta, Georgia from September, 1974 through December, 1974 and no defects in the aft ramp locking system were discovered during the course of required inspection at that time.

24. On March 16, 1975, Air Force maintenance personnel at Travis Air Force Base removed nos. 2 and 3 tie rods from the right hand side of the aft ramp of AF 68-218 in a process known as cannibalization, a procedure whereby parts are removed from one aircraft and installed on another aircraft to restore the second aircraft to operational service; this was often done to facilitate a Military Airlift Command (MAC) policy to fly every C-5A at least once every 20 days.

25. Cannibalization occurred becau e of lack of an adequate number of necessary parts in supply at the C-5 home bases, such as Travis AFB.

26. On March 24, 1975, other Air Force maintenance personnel installed other tie rods in the nos. 2 and 3 tie rod positions of the aft ramp of AF 68-218; however, after installing the tie rods, the Air Force mechanics did not completely rig the aft ramp locking system in accordance with the applicable Technical Manual TO 1C-5A-2-12, and other applicable Technical Orders, as required by AFR 8-2.

27. The last maintenance work performed on the aft ramp lock system of AF 68-218 was that performed at Travis AFB on March 29, 1975.

28. Thereafter, AF 68-218 departed Travis AFB on April 1, 1975, flew to Warner-Robbins AFB in Georgia, on-loaded 45.9 tons of howitzers and then flew to Saigon, South Vietnam with intermediate stops at Travis AFB, Hickam AFB in Honolulu, Anderson AFB in Guam and Clark AFB in the Phillippines.

29. AF 68-218 arrived in Saigon at 12:51 (Vietnam time) on April 4, 1975 and immediately discharged its cargo; thereafter, it was immediately reloaded with 301 passengers, of whom approximately 226 were Vietnamese orphans and took off at 16:03 (Vietnam time) on April 4, 1975 only three hours after arrival.

30. Ship 68-218 proceeded to Vung Tau marker beacon and passed the beacon at 4:12 p.m. (Vietnam time) at an air speed of 254 knots on a heading of 135°.

31. At 4:15 p.m. (Vietnam time) when AF 68-218 was more than 12 miles out over the South China Sea, as it was passing through approximately 23,000 feet altitude, locks 1, 2 and 3 of the right hand side of the aft ramp lock system, which were either unlocked or not in the overcenter position, dropped whatever load they were carrying and began the failure sequence detailed in the Engineering Analysis of Data from AF 68-218 (Tab T to the Aircraft Accident Report—Trial Exhibit D1) which severed the hydraulic lines and control cables running to the T-tail of the aircraft, resulting in loss of pitch and rudder control of the aircraft.

32. The Air Force mechanics' failure to completely rig the aft ramp lock system on AF 68-218 possibly resulted in incomplete locking of the aft ramp locking system in Saigon, South Vietnam on April 4, 1975 since no maintenance was performed after the aircraft left Travis.

33. Any misrigging of the right hand side of the aft ramp locking system of AF 68-218 most probably occurred because of the adjustment of no. 2 and 3 tie rods too long between locks No. 2 and 3 and locks No. 3 and 4, the installation of a homemade tie rod of insufficient strength or length, or the failure to safety wire or cotter key the nut on one of the ends of either no. 2 or 3 tie rods on the right side of the aft ramp lock mechanism.

34. Although palletized passenger seating kits were available at Travis Air Force Base which included seatbelts, oxygen masks and life jackets for use where passengers were to be carried on the cargo deck, these were not used; indeed, passengers including infants and adults were seated on the floor of the cargo deck on blankets and pillows and strapped down with cargo straps.

35. Life support equipment (oxygen, life jackets, life rafts) was not available for all AF 68-218 passengers in accordance with AFR 60-16 (Exhibit D309).

36. Of the 149 passengers and two crewmembers in the cargo compartment only 8 survived.

37. Also, 152 passengers and 7 medical crew members were carried in the troop compartment which had seats and oxygen equipment for only 75 passengers.

38. Some passengers on AF 68-218 did not have seats or seatbelts and the number of passengers exceeded the number of oxygen masks, life jackets and life rafts available.

39. Of the 159 passengers and crew in the troop compartment all but 3 survived.

40. All 11 of the crewmembers in the upper crew deck also survived.

41. The only fatalities in the troop compartment were as to persons without seatbelts or restraining equipment.

42. However, of the 149 passengers in the cargo compartment, only 8 survived.

43. There is no competent evidence that the accident herein resulted from structural or stress corrosion failure of a tie rod, bellcrank or other component, and there was no evidence prior to the accident that any structural problem existed as to the aft ramp locking system.

44. Testing by Lockheed before the accident and in connection with the investigation indicated that failure of component parts of AF 68-218 was most probably not the cause of the accident.

45. An Air Force mechanic who followed all of the pertinent provisions of the Technical Manual 1C-5A-2-12 in accordance with AFR 8-2 would have completely rigged the aft ramp lock system and the accident might have been avoided.

46. The rapid decompression, loss of the pressure door, aft ramp and pitch and rudder controls to AF 68-218 occurred more than 12 nautical miles from the coast of South Vietnam over the South China Sea which the aircraft was enroute from Saigon to Clark AFB in the Philippines and ultimately to the United States.

47. In applying its cannibalization policy and in view of the number of components removed and replaced, the Air Force may have failed to abide by its own regulations regarding cannibalization.

48. The flight of this particular aircraft was ordered either from MAC Headquarters 22nd Air Force in Bellville, Illinois or by the Commanding Officer of the 60th Military Airlift Wing at Travis Air Force Base.

49. Lockheed adequately conducted investigations of military accidents under its System Safety Plan wherein the Air Force retained primary jurisdiction to investigate military accidents and wherein Lockheed provided *all* necessary support and assistance as requested by the Air Force.

50. In the course of the investigations of this accident by the Air Force under AFR 127-4 Lockheed was asked to provide technical assistance as well as to furnish several engineers as technical advisors to the Aircraft Accident Investigation Board and Lockheed provided such services and advisors.

51. During the investigation of this accident, it was learned by the Lockheed support personnel that the Air Force may not have provided Lockheed with a copy of a report of the aft ramp locking system incident involving Ship 061 at Dover AFB in February, 1975. No follow up communication on this incident was initiated and information about this incident was not delivered to Lockheed until after the Saigon accident.

52. The unlocking of the locks in flight in the aft ramp of Ship 61 in February, 1975 was never reported to Lockheed and not until after the Saigon accident did Lockheed hear of it. In failing to provide such information to Lockheed as to the February, 1975 Ship 61 incident the Air Force accepted responsibility for the monitoring of maintenance as to the relevancy of that incident to the accident.

53. Lockheed depended upon the Air Force to inform it of operational problems and problems related to maintenance, parts supply, and reports of incidents for the C-5A because after delivery of the aircraft it could only provide assistance or recommend training based upon information provided it by the Air Force and also if approved by the Air Force Systems Program Office or after transition of responsibility in 1974, by the Air Force Logistics Command.

54. Although Lockheed had access to the Air Force 66-1 Maintenance Data Bank, the Air Force was responsible for the input of information. There was insufficient information in the Air Force 66-1 Maintenance

Data Bank to warn Lockheed of worn or defective parts of the aft ramp lock system or the frequent replacement of tie rods.

55. Components of the aft ramp locking system were not "sole source procurement" items and accordingly Lockheed was neither responsible for nor in a position to monitor the frequency or total amount of purchase from other vendors of spare parts for the aft ramp lock system.

56. Air Force procurement records indicate that purchase of the rods from any source prior to the Saigon accident were few and infrequent although the maintenance records for AF 68-218 alone just before the Saigon accident indicate a pattern of heavy cannibalization of aft ramp tie rods.

57. The Air Force failed to purchase sufficient parts to appropriately limit cannibalization of the rods. Had it done so, this accident may have been prevented.

58. By 1974 the Air Force had elected to discontinue automatic reporting of incidents and maintenance problems through the Unsatisfactory Report System but instead only selectively referred matters to Lockheed.

59. At the time of her death Ann Nash Bottorff was a civilian employee of the United States of America.

60. As a result of her death in the crash of AF 68-218 near Saigon, South Vietnam on April 4, 1975, one or more of the survivors of Ann Nash Bottorff were eligible for compensation under the Federal Employees Compensation Act.

61. One or more of the survivors of Ann Nash Bottorff applied for and received benefits under the Federal Employees Compensation Act as a result of the accident at issue herein.

Dated: Washington, D.C.
November 19, 1979

By /s/ James P. Piper
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of ANN NASH BOTTORFF, Deceased, Individually and on behalf of all others similarly situated,

Plaintiff,

—against—

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

—against—

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

FINAL JUDGMENT

[Filed Jan. 23, 1980]

This action came on for hearing before this Court upon the motion for summary judgment for indemnity and/or contribution filed November 19, 1979 by defendant Lockheed Aircraft Corporation as to the third party claims by defendant Lockheed against third party defendant United States of America and also upon third party defendant United States' motion to dismiss the third party complaint, filed November 19, 1979. All claims brought by plaintiff against defendant in this case, out of which the third party complaint arose, have been settled and dismissed, but the third party claims between defendant Lockheed and third party defendant United States were specifically preserved.

By its Order filed December 7, 1979, this Court granted defendant Lockheed's motion for summary judgment for indemnity and/or contribution on the third party complaint and by implication, as is specifically confirmed by this judgment, denied third party defendant United States' motion to dismiss the third party complaint.

Pursuant to Federal Rule of Civil Procedure 58, it is hereby: ORDERED and ADJUDGED

that defendant recover by way of indemnity and/or contribution from third party defendant United States a proportion, to be agreed upon between defendant Lockheed and third party defendant United States, of the total amount of the settlement between plaintiff and defendant Lockheed, with interest thereon from the date of this judgment at a rate of four (4) percent per annum in accordance with 28 U.S.C. § 2411(b) and 31 U.S.C. § 724(a).

Dated: January 22, 1980

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 75-0205
All Cases

IN RE AIR CRASH DISASTER NEAR SAIGON,
SOUTH VIETNAM ON APRIL 4, 1975

Civil Action No. 75-1831

VINCENT C. THOMAS, JR., Administrator of the Estate of Ann Nash Bottorff,
Plaintiff,

v.

LOCKHEED AIRCRAFT CORPORATION,
Defendant and Third-Party Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Third-Party Defendant.

NOTICE OF APPEAL

Filed Mar. 20, 1980

NOTICE IS HEREBY GIVEN that the United States of America, Third-Party Defendant, above-named, hereby appeals to the United States Court of Appeals for the

District of Columbia from the Judgment entered in this action on the 22nd day of January, 1980.

Respectfully submitted,

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LETTER FROM CLERK OF THE SUPREME COURT

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

April 30, 1982

Carroll E. Dubuc, Esq.
Haight, Gardner, Poor & Havens
1819 H Street, N.W.
Washington, D.C. 20006

RE: Lockheed Aircraft Corporation v. United States, et al., No. 81-1181

Dear Mr. Dubuc:

Your request of April 29, 1982 for an extension of time to file the joint appendix and petitioner's brief on the merits in the above case has been granted, and the time has been extended to and including June 19, 1982.

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

By /s/ June M. Hoffman
(Miss) JUNE M. HOFFMAN
Assistant Clerk

cc: Hon. Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Opposition

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

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QUESTION PRESENTED

Whether a joint tortfeasor in the wrongful death of a federal employee is barred by the Federal Employees' Compensation Act from suing the United States for indemnity.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1181

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The order of the district court granting summary judgment (Pet. App. 9a-10a) is not reported. The district court's order incorporates by reference two earlier district court opinions (Pet. App. 11a-19a, 20a-32a), the second of which is reported at 476 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1981. The petition for a writ of certiorari was filed on December 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 8116(c), provides in pertinent part:

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

This case arose out of an accident involving a C-5A cargo plane that was manufactured by petitioner and was used by the United States in an emergency evacuation of approximately 300 people out of Saigon, Viet Nam, on April 4, 1975. The plane crashed, killing approximately 144 people. One of the passengers killed in the crash was Ann Nash Bottorff, a civilian employee of the Department of the Navy (Pet. App. 2a). Bottorff's estate received death benefits from the United States under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* (Pet. 2). Additionally, on November 4, 1975, the administrator of Bottorff's estate filed suit against petitioner seeking damages for her wrongful death and for injuries suffered prior to her death. On January 9, 1976, petitioner impleaded the United States as a third-party defendant, seeking indemnity or contribution on a variety of tort and contract theories. Counts I and II of petitioner's third-party complaint asserted a right to indemnity or contribution under the

Federal Tort Claims Act (FTCA), 28 U.S.C. 2680 *et seq.*; Counts III and IV sought relief under admiralty law; and Count V involved a claim for contractual indemnity. Petitioner subsequently abandoned its contractual indemnity claim (Pet. App. 2a-3a & n.2).

Petitioner settled with Bottorff's estate and then moved for summary judgment in the third-party action. The government filed a motion to dismiss on the ground that petitioner's action was barred by the FECA (Pet. App. 3a). In an order dated December 7, 1979, the district court granted petitioner's motion for summary judgment (*id.* at 9a). The district court held that petitioner was entitled to indemnity from the United States under the FTCA and that such a claim over was not barred by the FECA (*id.* at 10a).[1]

The government appealed, and the court of appeals reversed (Pet. App. 1a-8a). It found in 5 U.S.C. 8116(c) a clear intention to prohibit tort claims for contribution or indemnity that merely derived from duties owed by the government to its employees. Petitioner's claim for indemnity was based on an assertion that the government had failed to use and maintain the aircraft properly. Those obligations, the court held, did not run to petitioner; they were "clearly derivative and based upon the duties owed by the Government to its employees and passengers" (Pet. App. 7a). With respect to petitioner's claim for contribution, the court also held that "no right of contribution exists 'unless there is a joint liability of both parties to the injured person' " (*id.* at 5a). The FECA, however, had displaced the government's tort liability for injuries to its own employees.[2] The court of

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[1]The district court did not reach petitioner's maritime law claims.

[2]At this stage petitioner does not contest the disposition of its claim for contribution (Pet. 7 n.9).

appeals remanded the case to the district court for a determination of jurisdiction over petitioner's maritime law claims, and a decision about the effect of the FECA on such claims (*id.* at 8a n.5).

ARGUMENT

1. The court of appeals correctly interpreted the FECA to preclude petitioner's claim for indemnity against the government. 5 U.S.C. 8116(c) states that the duty of the United States to pay compensation regardless of fault under the FECA is "exclusive and instead of all other liability of the United States" to "any other person * * * entitled to recover damages from the United States * * * because of the injury or death" of its employee. The court of appeals was obviously correct in concluding that the government owed no independent obligation to petitioner, which was really relying on duties owed by the government to its employees. That being so, petitioner is claiming a right to indemnity "because of" the employee's death, and its claim is barred by the FECA's unqualified limitation of liability.

Petitioner does not now dispute that its third-party claim against the government derives from the employee's. Rather, it argues that the phrase "any other person" refers only to people like dependents and beneficiaries, not to unrelated third parties. It also asserts that reading the FECA to bar an indemnity claim by a passive wrongdoer is unfair, because it exposes petitioner to a judgment for the entire amount of the plaintiff's damages (Pet. 11).

In analogous contexts this Court has rejected both of these claims. For example, the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, establishes a statutory no-fault compensation scheme for injured servicemen, as the FECA does for government employees. Unlike the FECA, the Veterans' Benefits Act does not explicitly provide that it is the exclusive remedy against the government for servicemen's injuries. Notwithstanding that fact, this Court held in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666

(1977), that an indemnity claim against the United States under the FTCA was barred where the Veterans' Benefits Act prevented the injured serviceman himself from suing under the FTCA. The Court explained:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." * * * "To permit [an indemnity claim] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result."

431 U.S. at 673 (citations omitted). The Court explicitly rejected the argument that "petitioner [a manufacturer of military aircraft parts] as a third-party claimant should not be barred from indemnity for damages which it may be required to pay to the serviceman, and as to which it has no alternative federal remedy." *Id.* at 672.

The history of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) provides another parallel. Section 5 of the LHWCA, 33 U.S.C. 905, provides, in language virtually identical to that used by the FECA, that the statutory compensation scheme is the exclusive remedy against the employer for an employee's injury or death.[3]

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[3]Section 5 states:

> The liability of an employer prescribed in section 904 of this title [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *.

In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124 (1956), relied upon by petitioner (Pet. 12-13 n.16), this Court held that Section 5 did not

This Court has made clear that under those circumstances, a third party who was a joint tortfeasor with the employer had no right of contribution from the employer. *Atlantic Coast Line R.R.* v. *Erie Lackawanna R.R.*, 406 U.S. 340 (1972); *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952). Cf. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974). As the Court said in *Cooper* (*id.* at 115): "[E]ven if [the employer] were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and [the employer] was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions" when sued for contribution.[4]

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free a stevedore-employer from a contractual obligation that it had undertaken to indemnify the shipowner. But this Court continually emphasized that "[s]uch a liability springs from an independent contractual right. * * * The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. * * * Consequently, the considerations which led to the decision in *Halcyon Lines* * * * are not applicable." *Id.* at 130-133.

The purpose of the 1972 amendment to the LHWCA, 33 U.S.C. 905(b), was to nullify this contractual duty to indemnify, and to overrule *Ryan. Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974).

[4]Petitioner relies in part on *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963), which held that a shipowner was entitled to indemnity against the government in connection with a maritime collision, notwithstanding the FECA's limitation of liability. But the reason for that conclusion was that the Public Vessels Act had made applicable to the government the "historic admiralty rule of divided damages in mutual fault collisions." *Id.* at 600. And that rule had previously been held to prevail over statutory provisions limiting liability. *Id.* at 603-604. As a result, the lower courts have, quite correctly, interpreted *Weyerhaeuser* to apply only to maritime collision cases. See, *e.g.*, *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949, 954-955 (2d Cir. 1975); *Sheridan* v. *Di Giorgio*, 372 F. Supp. 1373 (E.D. N.Y.), aff'd without opinion, 505 F. 2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); *Empire Seafoods, Inc.* v. *Anderson*, 398 F. 2d 204, 213 and n.12 (5th Cir.), cert. denied, 393 U.S. 983 (1968); *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d

2. Contrary to petitioner's suggestion (Pet. 6-9), there is no "vibrant" conflict among the circuits regarding the FECA's effect on tort indemnity claims. With the exception of a 1969 Fourth Circuit decision, every circuit to address the question has held that the FECA bars third-party claims against the United States that are not based on some independent contractual duty.[5] Even the Fourth Circuit's maverick position in *Wallenius Breman G.m.b.H.* v. *United States*, 409 F. 2d 994 (1969), cert. denied, 398 U.S. 958 (1970), has shown signs of erosion. For example, in a concurring opinion in a recent Fourth Circuit decision, Judge Hall suggested that the *Bremen* rule should be reconsidered en banc, commenting:

379, 402-404 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964). But see *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F. 2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970).

The Fourth Circuit has recently held that the *Stencel Aero* rule against indemnity claims in Veterans' Benefits Act cases does not apply to maritime collisions. *Ionian Glow Marine, Inc.* v. *United States*, No. 81-1466 (Jan. 26, 1982). Even if correct, the decision has little bearing on this case, since the justification for departing from *Stencel* was *Weyerhaeuser's* unique divided damages rule, whose application, as noted above, is restricted to maritime collisions.

[5]See, *e.g.*, *Kudelka* v. *American Hoist and Derrick Co.*, 541 F. 2d 651 (7th Cir. 1976) (involving a claim for tort indemnity); *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949 (2d Cir. 1975) (involving a claim for contribution); *Travelers Insurance Company* v. *United States*, 493 F. 2d 881 (3d Cir. 1974) (involving a claim for indemnity or contribution); *Newport Air Park, Inc.* v. *United States*, 419 F. 2d 342 (1st Cir. 1969) (involving a claim for contribution); *Wien Alaska Airlines, Inc.* v. *United States*, 375 F. 2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967) (involving a tort indemnity claim), which followed *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (involving a tort indemnity claim); *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373 (E.D. N.Y.), aff'd without opinion, 505 F. 2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). Contra, *Wallenius Bremen G.m.b.H.* v. *United States*, *supra*.

In 1974 Congress amended the FECA in numerous respects, including modifications to Section 8116. Pub. L. No. 93-416, 88 Stat. 1143. It

> [T]hat decision [*Bremen*] is binding precedent for the Circuit. Nevertheless, *Bremen* is wrong because it misinterpreted the authorities upon which it relied, and because it failed to recognize the importance of exclusivity provisions to workmen's compensation programs. *Bremen's* faulty analysis has been criticized and rejected by the other circuits [footnote omitted], leaving our court with the dubious distinction of being the sole adherent to the *Bremen* rule.

Glover v. *Johns-Manville Corp.*, 662 F. 2d 225, 233 (4th Cir. 1981). Hence, there is reason to believe that, in an appropriate case, the Fourth Circuit would be prepared to reconsider *Bremen* in light of *Stencel Aero* and the subsequent decisions in several other courts of appeals. Until the Fourth Circuit indicates that it still adheres to its solitary view, there is no need for this Court to intervene.[6]

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can be presumed that Congress was by then aware of the courts' virtually uniform interpretation of Section 8116(c) to bar tort indemnity claims. Yet there is no suggestion in the legislative history of these amendments that the courts have departed from Congress' original intent. See also Pub. L. No. 90-83, 81 Stat. 195 (1967 amendments to FECA).

[6]Contrary to petitioner's contention (Pet. 8), the Fourth Circuit did not "refuse to overrule *Bremen*" in *Glover*. In fact, *Glover* held that the manufacturer, charged only with active conduct, was not entitled to noncontractual indemnity against the United States. *Glover* v. *Johns-Manville Corp.*, *supra*, 662 F. 2d at 229. In the course of its opinion the court simply "assume[d] without deciding that §8116(c) of the FECA is inapplicable to this action * * *." *Id.* at 228.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

DOJ-1982-02

Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1981

No. 81-1181

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lockheed has petitioned for a writ of certiorari to review a decision of the Court of Appeals for the District of Columbia Circuit that sustains a direct conflict between the Fourth and Fifth Circuits, on the one hand, and the D.C., Second, Third, Seventh, and Ninth Circuits, on the other. The issue dividing these circuits is an important question of federal law requiring uniform treatment—whether the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), bars a claim for indemnity against the United States by a party secondarily liable for the death or injury of a federal employee caused by the United States' primary and active negligence.[1] Under

[1] Although the Court of Appeals spoke loosely of Lockheed's claim for "contribution or indemnity" (Pet. App. 2a), in view of the undisputed facts establishing the Government's active and primary negligence (Pet. 3-5), the District Court in granting Lockheed's motion for summary judgment properly termed Lockheed's claim against the United States as one for "indemnity" (Pet. App. 10a). See Pet. 6-7, 9, nn. 8-10. The Government states that "[p]etition-

the decision below, a stranger to the compensation system who is only secondarily responsible must bear the entire burden of liability, while the primarily responsible party who is in the best position to avoid an accident is excused. Lockheed's petition shows that the Court of Appeals' interpretation of 5 U.S.C. § 8116(c) is unsupported by the language and purpose of that provision, to eliminate the Government's tort liability to its employees in exchange for assured compensation, and is in conflict with this Court's decision in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 600-03 (1963). Pet. 11-17.

In its Opposition, the Government does not deny that the Court of Appeals' interpretation of the FECA places an unfair burden on Lockheed and an extraordinary risk on anyone dealing with the Federal Government, contrary to sound principles of tort indemnity. And it appears to agree that the decision below sustains a direct conflict on an important issue as to which a uniform, national rule is needed. However, it takes the position that "[u]ntil the Fourth Circuit indicates that it still adheres to its solitary view, there is no need for this Court to intervene." Opp. 8. The Government also argues that *Weyerhaeuser* is irrelevant, that the text of § 8116(c) plainly bars tort indemnity claims, and that this Court's decisions regarding other statutory compensation schemes support the decision below. Opp. 4-6. Lockheed replies briefly to these arguments below.

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er's claim for indemnity was based on an assertion that the government had failed to use and maintain the aircraft properly." Opp. 3. However, Lockheed's claim for indemnity was based not only on the undisputed facts establishing the Government's misuse and improper maintenance, but also on the Government's participation in the design and testing of the aircraft. Pet. 4. Thus, in this case the Government not only misused and improperly maintained the airplane, it shared the duties of design and testing that imposed strict liability on Lockheed.

1. *The Conflict Among the Circuits Is Ripe for Resolution by this Court.*

The Government argues that this Court should prolong the uncertainty caused by the inter-circuit conflict regarding the FECA's effect on tort indemnity claims because "the Fourth Circuit's maverick position in *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (1969), cert. denied, 398 U.S. 958 (1970), has shown signs of erosion." Opp. 7. It concludes that until the Fourth Circuit reaffirms *Bremen*, this Court should not intervene. Opp. 8.

The "erosion" of *Bremen* perceived by the Government arises from the recent decision in *Glover* v. *Johns-Manville Corp.*, 662 F.2d 225, 233 (4th Cir. 1981). In fact, *Glover* is virtually the reaffirmation of *Bremen* that the Government would have this Court await. See Pet. 8-9. In *Glover*, the Fourth Circuit declined the Government's suggestion to overrule *Bremen*. Instead, it "assume[d] without deciding that § 8116(c) of the FECA is inapplicable," rejected the Government's contention that *Weyerhaeuser*, upon which *Bremen* relied, had been overruled, and held on the merits that the third-party claimants were actively and primarily liable and hence were not entitled to indemnity from the United States. 662 F.2d at 228-29. The concurring opinion of Judge Hall, on which the Government relies, strongly objected to the majority's "implied application of the *Bremen* doctrine." 662 F.2d at 233. In short, *Glover* underscores *Bremen's* current vitality.[2]

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[2] The Government also suggests that Congress' action in amending the FECA in 1974, Pub. L. No. 93-416, 88 Stat. 1143, without addressing the issue of tort indemnity, should be deemed an endorsement of the construction of § 8116(c) adopted by a plurality of the courts of appeals and a rejection of the minority position. Opp. 7-8 n.5. However, that amendatory statute did not affect § 8116(c) and its legislative history does not indicate any awareness of how that provision had been interpreted. Thus, the 1974 amendments shed no light on whether § 8116(c) bars tort indemnity, and they certainly

Furthermore, the Fifth Circuit has joined the Fourth Circuit in holding that tort indemnity claims against the Government are not barred by § 8116(c). In *Sandoval* v. *Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163, 1168-69 (5th Cir. 1972), a shipowner liable for injury to an employee of the Panama Canal Company (an instrumentality of the United States) was awarded indemnity from the company on both a tort and implied warranty theory. The Fifth Circuit dismissed the argument that the shipowner's indemnity claim was precluded by the FECA, stating that the "identical argument was rejected by the Supreme Court in Weyerhaeuser . . . ." 460 F.2d at 1169. *Accord*, *Sommer Corp.* v. *United Fruit Co.*, 479 F.2d 1131 (5th Cir. 1973). *Sandoval* was recently reaffirmed by the Fifth Circuit in *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1114-15 (5th Cir. 1981).

In short, the inter-circuit conflict is robust and ripe for resolution.

2. ***This Court's Interpretation of the FECA in* Weyerhaeuser *Is Not Limited to Maritime Collision Cases.***

The Government dismisses this Court's decision in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963) as limited to maritime collision cases. Opp. 6-7, n. 4. As explained in the Petition, however, the Court's careful analysis of the text and legislative history of the limitation-of-liability provision of the FECA—finding in neither the statute's language nor its history an intent to affect the rights of third parties to indemnity—is not limited to the specific factual context of that case.

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cannot be viewed as a congressional resolution of the judicial conflict.

By contrast, the 1975 report of the congressionally established Commission on Revision of the Federal Court Appellate System discussed the inter-circuit conflict on whether § 8116(c) bars claims for tort indemnity as a primary example of an important, unresolved conflict on an issue requiring a nationally binding decision. See Pet. 6-7.

Pet. 13-17. See *Sandoval* v. *Mitsui Sempaku KK Tokyo*, 460 F.2d 1163, 1168-69 (5th Cir. 1972); *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994, 996-97 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). Only by ignoring the heart of the opinion in *Weyerhaeuser*, 372 U.S. at 600-03, can the Government distinguish this Court's authoritative and persuasive construction of the FECA.[3]

3. *The Language of Section 8116(c) Does Not Bar Tort Indemnity Claims*

The Government argues that Lockheed "is claiming a right to indemnity 'because of' the employee's death" and that therefore Lockheed's claim is barred by the plain terms of § 8116(c). Opp. 4. In this connection, the Government asserts that "[p]etitioner does not now dispute that its third-party claim against the government derives from the employee's." Opp. 4.

On the contrary, Lockheed's petition identifies three reasons why its claim for indemnity is outside the language of § 8116(c). First, as this Court recognized in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600-01 (1963), the phrase "anyone otherwise entitled" should be read in light of the prior enumeration of specific parties claiming through or on behalf of an injured or deceased federal worker. Pet. 16. Second, Lockheed is not claiming "damages" "because of" the death of Ms. Bottorff, but rather is seeking reimbursement because the United States' active negligence led to the imposition of secondary liability on Lockheed; the Government's active negligence creates a separate legal entity of rights independent of the employee's cause of action. Pet. 16-17 n.18. See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 417 (1969) (shipowner owes

[3] The Government also fails to address the fact that this Court's disposition of *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963) rejected the cramped interpretation of *Weyerhaeuser* the Government now urges. See Pet. 17.

stevedore a duty of due care under the circumstances to avoid the imposition of liability on the stevedore; breach of this duty may be remedied by a direct action in tort). Third, § 8116(c) is limited to "direct" judicial proceedings, as opposed to indirect third-party claims. See Pet. 11-12 & n.15.

4. *The* Stencel *and* Halcyon *Decisions Are Inapposite Here.*

The Government argues that this Court's decisions in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977) and *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952) support the judgment below. Opp. 4-6. Neither is apposite.

Stencel involved the question whether the United States is liable under the Federal Tort Claims Act to indemnify a manufacturer of military equipment for damages paid by it to a member of the Armed Forces injured in the course of military service. 431 U.S. at 667. In *Stencel* the Court examined the rationale of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that an on-duty serviceman injured due to negligence of Government officials may not recover against the United States under the Federal Tort Claims Act, to determine whether allowance of the indemnity claim would undermine the *Feres* doctrine. Although the *Feres* doctrine is grounded on three considerations—the appropriateness of subjecting a distinctly federal relationship to a variety of local substantive laws, the existence of an alternative compensation scheme, and the effect allowance of a suit would have on military discipline—"[a]t bottom, it is the third factor . . ., the protection of military discipline, that serves largely if not exclusively as the predicate for the *Feres* doctrine." *Hunt* v. *United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). See *United States* v. *Muniz*, 374 U.S. 150, 162 (1963), *quoting United States* v. *Brown*, 348 U.S. 110, 112 (1954) ("In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the

soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty' "). The Court in *Stencel* reasoned that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." 431 U.S. at 673. By contrast, the factor emphasized in the Government's brief (Opp. 4-5), the existence of an alternative compensation scheme, was in the Court's view in *Stencel* "difficult to apply" in the indemnity context. 431 U.S. at 672.

Halcyon and its progeny [4] stand for the proposition that a joint tortfeasor in a non-collision maritime case may not recover contribution from the injured employee's stevedore-employer. But this Court has carefully distinguished contribution from indemnity. Thus, in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), the Court held that the limitation-of-liability provision of the Harbor Workers' Act does not preclude a shipowner who has paid damages to an injured longshoreman from seeking indemnity on an implied warranty theory from the stevedoring contractor who employed the injured longshoremen.[5] See Pet. 12-13, n. 16. And in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 421 (1969), which held that a stevedore has a direct action in tort against a shipowner for the amount of compensation payments occasioned by the ship-

[4] See, *e.g.*, *Atlantic Coast Line R.R.* v. *Erie Lackawanna R.R.*, 406 U.S. 340 (1972); *cf. Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

[5] In the 1972 amendments to the Harbor Workers' Act, Congress abolished the stevedore's obligation to indemnify the shipowner for damages paid to an injured longshoreman. 33 U.S.C. § 905(b). No comparable amendment has been made to the FECA.

owner's negligence, this Court distinguished *Halcyon* and noted that *Ryan* had specifically reserved the question of the relation of the statutory compensation scheme to the shipowner's tort indemnity action against the stevedore-employer.

In short, *Stencel* and *Halcyon* have little bearing on the case at bar.

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

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March 2, 1982

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Office - Supreme Court, U.S.
FILED
JUN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where a federal civilian employee is killed due to the active negligence of the United States, is a party secondarily liable for her death precluded from recovering tort indemnity from the United States by the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c)?*

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* The only parties to the proceeding in the Court of Appeals were Lockheed Aircraft Corporation and the United States. This action was brought in the United States District Court for the District of Columbia by Vincent C. Thomas, Jr., as administrator of the estate of Ann Nash Bottorff, individually and on behalf of all others similarly situated, against Lockheed Aircraft Corporation. Lockheed impleaded the United States as a third-party defendant. After class certification was denied by the District Court, Lockheed settled plaintiff's claim (with the consent of the United States), so that plaintiff was no longer party to the action, although named in the captions of the decisions of the District Court and the Court of Appeals.

In 1977 the name of Lockheed Aircraft Corporation was changed to Lockheed Corporation. It has no parent company and no subsidiaries which are not wholly owned. In addition to the affiliates listed in the Petition at page i, Lockheed is affiliated with Los Angeles Fueling Facilities Corporation and Portland Fueling Facilities Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1181

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 665 F.2d 1330. The order of the District Court granting summary judgment (Pet. App. 9a) is unreported. There are two prior related decisions of the District Court (Pet. App. 11a, 20a), the latter of which is reported at 476 F. Supp. 521. The judgment of the Court of Appeals (Pet. App. 33a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1981. The Petition for Writ of Certiorari was filed on December 23, 1981, and was granted on April 5, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provision primarily at issue in this case is 5 U.S.C. § 8116(c). This provision was originally enacted as § 7(b) of the Federal Employees' Compensation Act (FECA) in the Federal Employees' Compensation Act Amendments of 1949. 63 Stat. 861. When Title 5 of the United States Code was enacted in 1966, § 7(b) of the FECA was slightly amended and codified as 5 U.S.C. § 8116(c). 80 Stat. 542. Section 8116(c) currently provides:

> "§ 8116. Limitations on right to receive compensation
>
> * * * *
>
> (c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel."

Also involved in this case are provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674, upon which Lockheed's claim for tort indemnity against the United States is founded. These provisions read in pertinent part:

> "§ 1346. United States as defendant
>
> * * * *
>
> (b) * * * [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or

loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

* * * *

STATEMENT

A. Background

On April 4, 1975, as part of the United States' effort to evacuate persons from South Vietnam, a C-5A aircraft took off from Saigon carrying approximately 320 persons, most of whom were Vietnamese orphans. (J.A. 69, 99). When the airplane reached an altitude of 23,400 feet the aft cargo door and aft ramp separated from the aircraft; in the process hydraulic lines and control cables running to the tail were severed. (J.A. 69-70, 99). The pilot attempted to return to the Saigon airport but crash landed before reaching it. At least 144 persons on board were killed. (J.A. 100).

The aircraft was manufactured by petitioner Lockheed Aircraft Corporation and delivered to respondent the United States on September 4, 1970. (J.A. 57, 94). In the four and one-half years between the delivery of the aircraft and the crash, the Air Force owned, operated and maintained the airplane. (J.A. 58-59, 94).

Following the crash lawsuits were filed against Lockheed by or on behalf of most persons on board, including surviving orphans, deceased orphans, military and civilian employees of the United States, and foreign nationals.

In each of these suits Lockheed impleaded the United States as third-party defendant and alleged that, if plaintiff recovered damages from Lockheed, then the United States was liable over to Lockheed for all or part of those damages. (Pet. App. 20a-21a).

B. Commencement of the Present Action

The present case was instituted against Lockheed on behalf of the estate of Ann Nash Bottorff, a civilian public information officer of the United States who was killed when the airplane crashed. Because her death occurred in the course of her employment, Ms. Bottorff's survivors were entitled to benefits under the applicable workmen's compensation law—the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 *et seq.* Pursuant to that Act, the Government paid death benefits to Ms. Bottorff's survivors. (J.A. 103). The statutory compensation benefits paid to these survivors constituted their exclusive remedy against the United States on account of Ms. Bottorff's death, 5 U.S.C. § 8116(c); however, they retained the right to institute suits for damages against third-party tortfeasors. See 5 U.S.C. §§ 8131-8132.

On November 4, 1975, the administrator of Ms. Bottorff's estate filed a diversity action against Lockheed seeking damages for wrongful death and for injuries suffered by Ms. Bottorff prior to her death. (J.A. 4). Lockheed impleaded the United States as a third-party defendant, seeking indemnity or contribution under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and on other grounds. (J.A. 25).[1] In November 1979, Lockheed

[1] Lockheed's third-party complaint contained five counts. Counts I and II sought indemnity and contribution, respectively, pursuant to the Federal Tort Claims Act. Counts III and IV sought indemnity and contribution under admiralty law. Count V sought indemnity pursuant to Lockheed's contract with the United States regarding the manufacture, sale and delivery of the C-5A. Neither the District Court nor the Court of Appeals reached the admiralty claims, and the Court of Appeals remanded the case for considera-

(with the consent of the Government) settled the claims asserted against it by Ms. Bottorff's estate. That settlement, however, did not dispose of the issues in the third-party action between Lockheed and the United States.

C. Facts Relating to Lockheed's Tort Indemnity Claim

The factual record relating to Lockheed's claim for tort indemnity was developed in response to a series of pretrial orders of the District Court requiring Lockheed and the Government (a) to submit pretrial briefs setting forth all facts proposed to be proven at trial and (b) to respond to each other's statements of fact. (J.A. 40, 46, 81). On September 25, 1979, Lockheed filed a pretrial brief containing the facts it intended to prove at trial. (J.A. 48). Ten days later, the Government submitted a pretrial brief stating that, based on "extensive depositions of government and Lockheed witnesses and review of many thousands of documents," it would not contest the sufficiency of the facts underpinning Lockheed's claim for tort indemnity. (J.A. 85-87).[2] The Government, however, maintained that Lockheed's claim was barred by 5 U.S.C. § 8116(c). (J.A. 90-91). On November 19, 1979, the parties filed a joint statement of material facts not in dispute. (J.A. 92).

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tion of those claims. (Pet. App. 8a n.5; 665 F.2d at 1334 n.5). Lockheed did not pursue the contract claim in the District Court. See note 7, *infra*. Thus, the only claims reached by either of the courts below were those founded on the Federal Tort Claims Act.

[2] In related litigation concerning the claims of orphans allegedly injured by the crash landing, the United States agreed not to "contest its liability to Lockheed for indemnification or contribution for any . . . compensatory damages" paid by Lockheed to these orphans. *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, C.A. No. 76-0544 (D.D.C.) (stipulation of Sept. 14, 1979). These cases are being tried seriatim on the issues whether each plaintiff has an injury (usually an alleged learning disability), whether that injury was proximately caused by the accident, and the amount of damages, if any, owing. See *Schneider* v. *Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981).

Lockheed's claim for tort indemnity against the United States is based, *inter alia*, on the following uncontested facts, developed in the pretrial briefs and joint statement, showing that the Government's active and primary negligence caused the crash:

In 1965, the United States contracted with Lockheed for the development and production of the C-5A aircraft. (J.A. 51-52, 92-93). In accordance with the terms of the contract, the Air Force actively participated in the aircraft's design, testing and production. (J.A. 53, 93). Among other things, the Air Force provided "design-to" specifications for the aft cargo door system and the hydraulic and flight control systems; these specifications dictated the manner in which Lockheed designed the systems. (J.A. 56, 94).[3] The Government also participated in and approved the preliminary and final design of the aft cargo door system and the hydraulic and flight control systems. (J.A. 53, 93). These systems met the state of the art at the time of the design. (J.A. 56, 94).[4]

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[3] "Design-to" specifications tell the contractor what the aircraft and its subsystems must be able to do within certain parameters relating to weight, size, aerodynamic design, structure, speed, and so forth.

[4] In hearings before the Senate Armed Services Committee on the C-5A aircraft program, Senator Goldwater described the "technology of developing and producing the world's largest aircraft" as "a great step forward." *Authorization for Military Procurement, Fiscal Year 1970: Hearings on S.1192, S.2407, and S.2546 Before the Senate Comm. on Armed Services*, 91st Cong., 1st Sess. 2156 (1969). This technology was developed in response to the Government's contractual requirements, as evidenced by the substantial changes that were made to the original C-5A design in order to conform to the contract specifications. *Id.* at 2140 (statement of Daniel J. Haughton, Lockheed Chairman of the Board). In fact, much of the design and production of the C-5A took place in government faciliities. *Id.* at 2147. The contract itself was a novel experiment in government procurement policy—a "total package contract" which required concurrent research, development, design, and manufacture of the aircraft. *Military Posture*

The aircraft involved in the accident giving rise to this litigation, the AF 68-218, was the twenty-first C-5A manufactured by Lockheed. Delivery of the AF 68-218 to the Air Force occurred on September 4, 1970, and thereafter the aircraft was owned, operated on numerous missions, and maintained and repaired solely by the Air Force. (J.A. 57-59, 94).

Around June 1971 Lockheed learned that Air Force personnel were improperly rigging the forward and aft cargo doors of C-5A aircraft and removing parts from these systems for use on other aircraft. (J.A. 62). Based on this information, Lockheed in October 1971 proposed that the Air Force implement a special instructional program for its personnel dealing with the rigging of the forward and aft cargo doors. The Air Force rejected this proposal. (J.A. 62-65, 96-98).

On March 16, 1975, Air Force maintenance personnel at Travis Air Force Base, California, removed certain tie rods from the right hand side of the AF 68-218's aft ramp for use on another C-5A. (J.A. 67-68, 98). This "cannibalization" occurred because Travis Air Force Base lacked an adequate supply of necessary spare parts for the C-5A. (J.A. 67, 98).

On March 24 and March 29, 1975, Air Force personnel at Travis Air Force Base performed the last maintenance on the AF 68-218. They failed to properly rig the aft ramp locking system, in violation of applicable Air Force regulations. (J.A. 67-68, 98-99). This misrigging may have occurred because the Air Force manufactured and installed in the aircraft a "home-made" tie rod of insufficient strength or length. (J.A. 70, 100).

On April 1, 1975, the aircraft departed Travis Air Force Base, flew to Warner-Robbins Air Force Base in

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and Legislation, Fiscal Year 1970: Hearings Before the House Armed Services Comm., 91st Cong., 1st Sess. 2178 (1969) (statement of Daniel J. Haughton). Thus, the Government's participation in the design and production of the C-5A was far greater than the ordinary purchaser's participation, if any, in the manufacturing process.

Georgia to pick up a load of howitzers, and then flew to Saigon after making four intermediate stops. (J.A. 99). The aircraft arrived in Saigon shortly before 1:00 p.m. on April 4, discharged its cargo, took on approximately 301 passengers, and departed just after 4:00 p.m. that same afternoon. (J.A. 99). The passengers were loaded into both the troop compartment of the aircraft and into its lower cargo compartment. Although palletized passenger seating for the lower cargo compartment of the C-5A was available at Travis Air Force Base and could have been installed for this mission, it was not. (J.A. 100). As a result, the passengers in the cargo compartment were not restrained on seats by seatbelts but were instead seated on the floor of the cargo deck restrained by cargo straps. (J.A. 100).

Shortly after takeoff, the aft cargo door unlocked, causing the door and the aft ramp to separate from the aircraft. Hydraulic lines and control cables which ran to the tail of the aircraft were severed. (J.A. 69-70, 99). The pilot attempted to return to the Saigon airport but crash landed in a rice paddy several miles short of the Saigon airport runway.

Of approximately 151 passengers and crew members in the cargo compartment, only 8 survived. (J.A. 100). In contrast, all but 3 of the approximately 159 passengers and crew in the troop compartment survived. (J.A. 100).

The accident was caused by improper rigging and maintenance performed by Air Force personnel. (J.A. 75-76, 78, 99-100). There were no structural failures in the aft ramp locking system which could have caused the accident. (J.A. 74, 101).

D. Decisions Below

On November 19, 1979, Lockheed moved for summary judgment as to its tort indemnity claim on the ground that the uncontested facts demonstrate "the active and primary negligence of the United States" (J.A. 89,

C.A.J.A. 161); the Government concurrently moved to dismiss Lockheed's claim as barred by 5 U.S.C. § 8116(c). (J.A. 91). The District Court ruled that § 8116(c) did not bar Lockheed's claim for indemnity with respect to its settlement payment to Ms. Bottorff's estate, and that Lockheed was entitled to tort indemnity under principles of District of Columbia law and federal common law. (Pet. App. 10a). Subsequently, the court entered a judgment providing that Lockheed shall "recover by way of indemnity and/or contribution from third party defendant United States [the agreed-upon] proportion . . . of the total amount of the settlement between [Ms. Bottorff's estate] and defendant Lockheed."[5] (J.A. 105-06).

The Court of Appeals reversed. The court held that § 8116(c) bars claims for contribution or tort indemnity against the United States that derive from duties owed by the Government to its employees.[6] According to the

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[5] Lockheed and the United States have entered into two agreements dealing with Lockheed's rights to recover from the United States for judgments entered against Lockheed or settlement payments made by Lockheed in cases arising out of the crash. These agreements were filed in the District Court under seal pursuant to a protective order. See, *e.g.*, *Supplemental Statement of Facts to the Brief for the Appellant*, Court of Appeals Record, Document 16. The District Court's final judgment, in awarding Lockheed reimbursement in the agreed-upon proportion, was referring to those agreements.

[6] The court also ruled that Lockheed could not assert a valid contribution claim for another reason. According to the court, under common law principles no right of contribution can exist between two parties "'unless there is a joint liability of both parties to the injured person.'" (*Id.*, *quoting Murray* v. *United States*, 405 F.2d 1361, 1364 (D.C. Cir. 1968)). Since the FECA had extinguished the Government's liability to its own employees, the court reasoned, Lockheed's claim for contribution was barred by this principle of the law of contribution. (Pet. App. 5a-6a; 665 F.2d at 1332-33).

The Court of Appeals did not decide whether a claim for tort indemnity also requires common liability. It noted that *Murray* had questioned decisions such as *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964)

court, the tort duties allegedly owing to Lockheed which the Government breached—"the duty to use the aircraft in the manner contemplated by both Lockheed and the United States" and "the duty to provide adequate maintenance to prevent accidents of this type from occurring" —were "clearly derivative and based upon duties owed by the Government to its employees and passengers." (Pet. App. 6a-7a; 665 F.2d at 1333).[7] Because the duties on which Lockheed based its indemnity claim were "derivative," the court concluded, that claim constituted a claim "'on account of' the fatal injury to the employee" and hence was barred by § 8116(c).[8] (Pet. App. 8a; 665 F.2d at 1334).

SUMMARY OF ARGUMENT

This case involves 5 U.S.C. § 8116(c), an amendment to the Federal Employees' Compensation Act of 1916. The amendment was passed by Congress in 1949 to make clear that federal employees, their relatives, and their representatives could not sue the Government in tort in

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"that assumed that contribution and indemnity claims stood on the same footing [in this regard] . . . ." (Pet. App. 6a; 665 F.2d at 1333). In this Court Lockheed is pursuing only its tort indemnity claim.

[7] Lockheed had also claimed that the United States had breached its duty "to provide Lockheed with information about incidents involving the safety of the aircraft." One of the incidents involved partial unlocking of an aft cargo door in flight and occurred approximately eight weeks before the accident. (J.A. 78-80, 102). The Court of Appeals concluded that this claim sounded in contract rather than tort and was thus not properly before it since Lockheed had not pursued its contract claim in the District Court due to the Tucker Act, 28 U.S.C. § 1346(a)(2), which requires an express or implied-in-fact contract claim in excess of $10,000 to be presented in the Court of Claims. (Pet. App. 7a; 665 F.2d at 1333).

[8] The term "on account of" is a common statutory phrase in workmen's compensation statutes, and was utilized in the original limitation-of-liability provision of the FECA. See notes 26 & 35, *infra*. When that provision was codified in Title 5, the phrase "because of" was substituted for the phrase "on account of."

lieu of or in addition to collecting workmen's compensation. The question presented is whether that amendment should be read to bar third parties who have settled with or paid damages to federal employees from recovering tort indemnity from the United States.[9]

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[9] A claim for tort indemnity, such as Lockheed's, should be distinguished from a contribution claim. Dean Prosser has aptly summarized when a duty to indemnify will be found:

> "Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct." W. Prosser, *Law of Torts* 313 (4th ed. 1971).

Indemnity rests on an independent duty owed the indemnitee by the indemnitor. See, *e.g.*, *American Dist. Telegraph Co.* v. *Kittleson*, 179 F.2d 946, 951-54 (8th Cir. 1950). As this Court has held, such an independent duty exists and thus indemnity lies when one party's negligence foreseeably leads to the imposition of liability on another. *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969). Although indemnity began as an "all-or-nothing" doctrine, recently courts have developed doctrines of partial indemnity based on comparative fault. *E.g.*, *American Motorcycle Ass'n* v. *Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); *Dole* v. *Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

A right to contribution, as opposed to indemnity, is typically a statutory right that arises where two or more tortfeasors have jointly caused a plaintiff's injury, and one of the tortfeasors has defrayed more than his fair share of the associated damages. In such a situation, that tortfeasor will be allowed to recoup from the others any surplus he has paid in excess of his fair share. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 86-88 (1981). Contribution is based upon the view "that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and [that] it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Id.* at 88; see Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932). See also note 15, *infra*.

1. *The Text of the Statute.* Section 8116(c) provides that the Government's liability to pay workmen's compensation to an employee or his survivors supplants "all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of [the employee's] injury or death . . . ." The statute plainly does not bar the present third-party action unless Lockheed is covered as one of the "other persons" otherwise entitled to recover damages from the United States. Because the general phrase "any other person" follows a list of specific individuals claiming under or through an employee, that phrase should be construed as being limited to persons whose rights to sue the Government are derivative from the injured or deceased employee's. That interpretation is consistent with the statute's purpose and is reinforced by the remainder of the statutory text, which provides that the statutory bar applies only to those entitled to recover "because of" the employee's injury or death.

An indemnitee such as Lockheed does not sue under or through an injured or deceased employee. Lockheed's tort indemnity claim arises because the United States, through its active negligence, admittedly breached several independent, implied-in-law duties owed Lockheed and these breaches foreseeably led to the imposition of tort liability on Lockheed. These duties included the duty to ensure that Air Force mechanics were properly trained and followed prescribed rigging procedures; the duty to have on hand an adequate supply of spare parts for the C-5A fleet and thus avoid cannibalization; the duty to use adequate safety equipment when carrying passengers on the C-5A; the duty to provide information to Lockheed about incidents involving the safety of the C-5A; and, in general, the duty to use due care to avoid the imposition of foreseeable liability on Lockheed. Lockheed's

claim is thus founded on the United States' independent wrong to it, not on the United States' wrong to its employee. See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969).

2. *The Legislative History.* Section 8116(c) was added to the FECA in 1949. Its legislative history demonstrates that Congress did not intend to extinguish the indemnity rights of third parties. The relevant Committee Reports explain the purpose of this provision as follows: (1) in 1916 when the FECA was enacted, injured federal employees generally could not sue the United States in tort; (2) subsequently Congress waived the Government's tort immunity by enacting the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act, and federal employees, spurred by the inadequacy of benefits under the FECA, began suing the United States in tort for their compensable injuries; and (3) because the 1949 amendments to the FECA would increase substantially the benefits provided to federal employees and their dependents, to permit them to pursue ordinary tort remedies against the United States would be unnecessary and uneconomical, both from the standpoint of the beneficiaries of the FECA and the Government. There is no indication, in the Committee Reports or any other legislative materials, that the FECA's limitation-of-liability provision was intended to extinguish the rights of strangers to the compensation scheme.

Had Congress in 1949 intended to preclude tort indemnity claims, it would certainly have expressed that intention. At that time, as now, employees and their representatives could sue third parties in tort for damages arising from injuries compensable under the FECA. Moreover, it was well-established that suits for indemnity and contribution against the United States were authorized under federal tort liability statutes. Nonetheless, Congress gave no hint in its hearings, reports, or debates

that third-party actions were to be barred by the FECA. To the contrary, Congress selected New York's Workmen's Compensation Law as its model for § 8116(c), and by 1949 that New York law had been authoritatively construed as not barring tort indemnity claims. *E.g.*, *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938). Thus, the legislative history, like the text of the statute, fails to provide a basis for the ruling below.

3. *Judicial Construction.* In *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), this Court held that the FECA does not bar a third party liable for a federal employee's work-related injuries from recovering contribution from the Government pursuant to the admiralty doctrine of divided damages. The rationale underlying that decision is that the language and legislative history of the FECA's limitation-of-liability provision disclose that Congress did not intend to curtail the reimbursement rights of strangers to the compensation scheme. That rationale is squarely applicable in the present case and requires reversal of the judgment below.

4. *The Mischief of the Court of Appeals' Decision.* The Federal Tort Claims Act waives the Government's immunity from suit for tort indemnity. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). The Court of Appeals, in construing the FECA as *pro tanto* nullifying this waiver, has disregarded the rule of statutory construction that an earlier statute will not be deemed impliedly repealed or qualified by a later one unless the intention of the legislature to repeal is clear and manifest. There is no evidence that Congress, in enacting the 1949 FECA Amendments, was concerned with abrogating the indemnity rights of parties unrelated to the compensation scheme, and thus there is no warrant for implying a partial repeal of the Federal Tort Claims Act.

The Court of Appeals' interpretation of § 8116(c), moreover, produces unjust as well as unintended results in third-party litigation, as this case illustrates. For most of the passengers on board the C-5A, Lockheed can shift much of the burden of a tort judgment or settlement payment to the United States who, by its own admissions of fact, is the actively negligent and primarily responsible tortfeasor. But for the federal employees, Lockheed must bear the whole cost and thus in effect subsidize a workmen's compensation scheme to which it is not a party. This result is especially unfair in view of the fact that Lockheed, as a product manufacturer, is subject to strict tort liability to the employees (even though the United States was involved in the design and testing of the aircraft) and that the Government's negligent misuse and improper maintenance of the product was the primary and active cause of the harm to its employees.

Denying indemnity under these circumstances where the uncontested facts justify indemnity is not only patently unfair to Lockheed, it is also contrary to the interests of public safety. The FECA, as construed below, would remove the financial incentive of the United States to heed manufacturers' requests to improve maintenance with respect to purchased products and to take other precautionary measures that might prevent future accidents from occurring. Preclusion of indemnity claims against the Government would also adversely affect the costs and effectiveness of Government procurement by increasing the costs and risks of contractors and discouraging qualified contractors from bidding on Government contracts. Because there is no evidence that Congress made a considered determination to tolerate such inequities and to accept such social and economic costs, the Act should not be read in a manner that would produce such results.

ARGUMENT

I. THE LANGUAGE OF SECTION 8116(c) DOES NOT PRECLUDE THE GOVERNMENT'S LIABILITY FOR TORT INDEMNITY

The Federal Employees' Compensation Act provides compensation benefits for federal employees who are injured, and for survivors of federal employees who are killed, in the performance of their duties.[10] Section 8116(c) precludes these FECA beneficiaries and their legal representatives from instituting tort actions against the United States to recover damages on account of the injury or death. Section 8116(c) does not, however, foreclose indemnity claims against the Government by parties such as Lockheed who are strangers both to the compensation system established by the FECA and to the injured employee.

Section 8116(c) reads, with relevant words italicized, as follows:

> "Limitations on right to receive compensation
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> * * * *
>
> *The liability of the United States* or an instrumentality thereof *under this subchapter* or any extension thereof *with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States* or the instrumentality *to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States* or the instrumentality *because of the injury or death* in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However,

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[10] On the death of a federal employee, the following persons may receive FECA benefits: the decedent's widow or widower, children, grandchildren, parents, grandparents, brothers and sisters. See 5 U.S.C. § 8133.

this subsection does not apply to a master or a member of a crew of a vessel." (Emphasis supplied).

As shown below, an indemnitee such as Lockheed (1) is not "any other person" within the meaning of the statute and (2) does not claim damages "because of" an employee's injury or death. Thus, Lockheed's claim is not within the statutory bar.

A. The Phrase "Any Other Person" Refers Only to Individuals Who Claim Under or Through an Injured or Deceased Employee

Under the principle of statutory construction known as *ejusdem generis*, "general terms which follow specific ones" are ordinarily limited "to matters similar to those specified." *Gooch* v. *United States*, 297 U.S. 124, 128 (1936); see *Third National Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 322 (1977) ("[i]t is a familiar principle of statutory construction that words grouped in a list should be given related meaning"). Thus, as this Court recognized in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 600-01 (1963), the phrase "any other person" in the FECA's limitation-of-liability provision must be construed in light of the statute's prior enumeration of specific persons. Aside from the employee himself, each of the enumerated persons is legally related to the employee. Because of that relationship, each of the specifically barred persons would, absent a provision such as § 8116(c), typically be entitled to institute suit against the Government upon the death or injury of the employee. Also because of that relationship, each of the specifically barred persons may benefit from the payment of FECA compensation. Accordingly, the phrase "any other person" in § 8116(c) should be construed to refer only to similarly situated persons claiming under or through an employee,[11] and should not be read to include

[11] Such persons include the beneficiaries of the Act listed in note 10, *supra*, and the legal representatives of such persons.

parties, such as Lockheed, who are strangers to both the employee and the FECA compensation scheme.[12]

While the rule of *ejusdem generis* should not be applied "to defeat the obvious purpose of legislation," *Gooch* v. *United States*, *supra*, 297 U.S. at 128, its application in this case is wholly consistent with Congress' objectives in enacting § 8116(c). The purpose of that provision, disclosed in pertinent legislative history and indeed apparent from the face of the statute, is to eliminate the Government's tort liability to its civilian employees and in exchange to afford them an assured compensation remedy for their injuries. See pp. 23-31, *infra*. There is no indication that Congress intended to cut off the rights of persons unrelated to an employee to seek reimbursement from the Government.

Construing the phrase "any other person" in § 8116(c) to mean only persons who might claim under or through an employee would also be consistent with this Court's construction of the nearly identical language of § 5 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA):[13]

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to *anyone claim-*

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[12] Even the title of the section—"Limitations on rights to receive compensation"—indicates that the statute's scope is limited to persons who benefit from the FECA compensation scheme. See generally *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941) (the title of a statutory section may be an aid to construction).

[13] At the time of the *Ryan* decision, § 5 of the LHWCA provided that "[t]he liability of an employer prescribed in section 4 [for compensation] shall be exclusive, and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ." 44 Stat. 1426 (1927).

> *ing under or through such employee*, on account of his injury or death arising out of that employment. In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other hand, the Act prescribes no *quid pro quo* for a shipowner [*i.e.*, third-party tortfeasor] that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages." *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 129 (1956). (Emphasis supplied).[14]

In short, under applicable rules of statutory construction and relevant decisions of this Court, Lockheed does not fall within the class of persons encompassed by the "any other person" language of § 8116(c).

B. An Indemnitee's Entitlement to Damages Does Not Arise "Because of" the Injury or Death of an Employee

As discussed above, the enumeration of specific persons in § 8116(c) demonstrates that the statutory bar applies only to claims asserted by those suing under or through an injured or deceased employee. This interpretation is reinforced by the remainder of the statutory text, which provides that the bar applies only to those entitled to recover "because of" an employee's injury or death. Unlike the employee and those claiming under him, a tort indemnitee's entitlement to damages does not arise

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[14] The Court in *Ryan* also described § 5 as excluding "the liability of the stevedoring contractor to its longshoreman, *and to his kin*, for damages on account of the longshoreman's injuries." 350 U.S. at 129-30 (emphasis supplied).

The *Ryan* Court ruled that a suit for indemnity based upon an implied contract between the shipowner and the stevedore is not precluded by § 5. See note 28, *infra*. In 1972, Congress amended the LHWCA to abolish the shipowner's right of indemnity against the stevedore. 33 U.S.C. § 905(b). See *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156, 165 (1981). No comparable amendment has been made to the FECA.

"because of [the employee's] injury or death" but, rather, because the indemnitor has breached an obligation to the indemnitee.[15]

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[15] Tort indemnity has its source in restitutionary principles. At bottom a tort indemnity claim is based upon a primary, active tortfeasor's breach of an implied-in-law quasi-contractual duty owed to a secondary tortfeasor to respond for all damages caused by the former's actively wrongful conduct. Indemnity differs in this respect from contribution. See *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219, 222 (D.C. Cir. 1942) ("[t]he difference between indemnity and contribution—in cases between persons liable for a wrong—is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages, whereas in the latter, there is no agreement, express or implied"). See also note 9 *supra*. Tort indemnity was well-established in this country long before contribution among joint tortfeasors became generally allowable. See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932). See also *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316, 327-28 (1896) (one wrongdoer cannot recover from another wrongdoer with whom the first is *in pari delicto* damages incurred in consequence of their joint offense; however, "[i]f the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense").

A duty "implied in law" must be distinguished from duties and obligations arising from an "implied-in-fact" contract. An "implied-in-fact" contract, like an express contract, is "founded upon a meeting of the minds" of two persons; instead of embodiment in express language, however, the duties and obligations of each party are "inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Baltimore & O. R.R.* v. *United States*, 261 U.S. 592, 597 (1923). An "implied-in-law" contract or duty, on the other hand, does not derive from agreement, tacit or otherwise, among the parties; rather, the duty is imposed by operation of law and derives from "equitable considerations." *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926); see *Baltimore & O. R.R.*, *supra*, 261 U.S. at 597. The Court of Claims' jurisdiction under the Tucker Act with respect to contracts "extends only to actual contracts, either express or implied in fact; it does not reach claims on contracts implied in law." *Hatzlachh Supply Co., Inc.* v. *United States*, 444 U.S. 460, 465 n.5 (1980). *Accord, Army & Air Force Exchange Service* v. *Sheehan*, 50 U.S.L.W. 4562, 4565 n.10 (U.S. June 1, 1982); *Alabama* v. *United States*, 282 U.S. 502, 506 (1931).

Lockheed's entitlement to damages arises because the United States, through its active and primary negligence, breached several implied-in-law duties that it owed to Lockheed and thereby exposed Lockheed to liability. These duties included the duty to ensure that Air Force mechanics were properly trained and followed prescribed rigging procedures; the duty to have on hand an adequate supply of spare parts for the C-5A fleet and thus avoid cannibalization; the duty to use adequate safety equipment when carrying passengers on the C-5A; the duty to provide information to Lockheed about incidents involving the safety of the C-5A;[16] and, in general, the duty to use due care to avoid the imposition of foreseeable liability on Lockheed.[17] Thus, Lockheed's claim is

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[16] It should also be noted that the United States' participation in the design and manufacture of the aircraft calls into play the equitable concerns underlying the "government contractor" defense and the "dual capacity" doctrine. Under the government contractor defense, a manufacturer is protected from products liability if the circumstances of manufacture were dictated by the United States acting in a capacity in which the Government is immune from liability. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 792 (E.D.N.Y. 1980). See generally *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). Under the dual capacity doctrine, when an employer acts in a capacity other than employer—such as product manufacturer—its liability in that capacity is not precluded by workmen's compensation statutes. See, *e.g.*, *Reed* v. *The Yaka*, 373 U.S. 410, 415 (1963); *Bell* v. *Industrial Vangas, Inc.*, 30 Cal. 3d 268, 179 Cal. Rptr. 30, 637 P.2d 266 (1981). Because of the United States' extensive involvement in the design and manufacture of the C-5A and because the accident may have resulted from the United States' fabrication and use of an inadequate tie-rod, the Government may also have breached the duty of care owed by one co-manufacturer to another.

[17] In the case at bar, the Government has conceded that, but for the FECA, Lockheed is entitled to tort indemnity based on breach of the asserted duties. See, *e.g.*, *Supplemental Statement of Facts to the Brief for the Appellant* (Nov. 16, 1980), Court of Appeals Record, Document 16. Thus, this Court has not been called upon to decide whether Lockheed has stated a valid claim for relief under substantive tort indemnity principles. The point here is simply that, assuming Lockheed has indeed stated a valid claim for in-

founded on the United States' independent wrong to it; it does not arise "because of" Ms. Bottorff's death.

The Court's opinion in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), demonstrates that a claim for tort indemnity such as Lockheed's is not derivative of the tort victim's claim and that it therefore does not arise "because of" the victim's injury or death. Under the LHWCA, a stevedore-employer who pays compensation benefits to the representative of a deceased employee may be subrogated to the rights of the representative against third-party tortfeasors. 33 U.S.C. § 933. The Court in *Burnside* held that this subrogation remedy is not the exclusive remedy available to a stevedore-employer who has paid such benefits, but that the stevedore-employer also possesses a direct action in tort against a shipowner for the amount of compensation payments occasioned by the shipowner's negligence. Thus, in *Burnside*, the Court allowed the stevedore-employer to sue the shipowner for the total amount of compensation payments due a deceased longshoreman's estate even though, if limited to a subrogation remedy, the stevedore would have recovered only a fraction of this amount due to a limitation on wrongful death recoveries under Illinois law. In reaching its holding, the Court explained that the shipowner owes a duty of due care to the stevedore as well as to the longshoreman:

> "[The] duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the shipowner's negligence caused damages to the stevedoring contractor's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of

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demnity, that claim cannot, as a matter of statutory construction of § 8116(c), be deemed to arise "because of" Ms. Bottorff's death.

> the stevedoring contractor for compensation payments to the representative of a longshoremar whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor." 394 U.S. at 415.

In the case at bar, the United States' failure to exercise due care with respect to the maintenance and use of the aircraft involved in the accident foreseeably led to Lockheed's payment of damages to Ms. Bottorff's estate.[18] It is the breach of this independent duty owed Lockheed that serves as the basis for Lockheed's indemnity claim. Accordingly, Lockheed's claim is not "because of" the employee's death and thus is not proscribed by § 8116(c). *Accord, Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567, 568 (1938); *American District Telegraph Co.* v. *Kittleson*, 179 F.2d 946, 954 (8th Cir. 1950); *Rich* v. *United States*, 177 F.2d 688, 691 (2d Cir. 1949).

II. THE LEGISLATIVE HISTORY OF SECTION 8116(c) DEMONSTRATES THAT CONGRESS DID NOT INTEND TO EXTINGUISH THE INDEMNITY RIGHTS OF THIRD PARTIES

Section 8116(c) was originally enacted as § 7(b) of the FECA in the Federal Employees' Compensation Act Amendments of 1949. 63 Stat. 861. The legislative history of that provision demonstrates that Congress did not intend to affect the rights of strangers to the compensation system to recover tort indemnity from the Government for damages paid to a federal employee or his survivors.

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[18] Some courts that have denied tort indemnity against the Government because of the FECA's limitation-of-liability provision would distinguish Lockheed's claim and find it allowable because the pre-existing relationship between Lockheed and the Government gives rise to independent duties. *E.g., Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373, 1377 (E.D.N.Y.), *aff'd without opinion*, 505 F.2d 727 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *Panico* v. *Whiting Milk Co.*, 335 F. Supp. 315, 317 (D. Mass. 1971).

The initial version of H.R. 3191, the bill eventually enacted as the 1949 Amendments, contained an exclusive remedy provision which read:

> "*The remedy afforded to any person under this Act with respect to his own injury or the death of another individual shall,* unless otherwise specifically provided by law, *be the exclusive remedy* against, and be in place of any other legal liability of, the United States, or any of its instrumentalities wholly owned by it, *on account of such injury or death,* where such liability is determinable by direct judicial proceedings at law or in admiralty, or by proceedings under any other workmen's compensation law or under any Federal tort liability statute." H.R. 3191, § 201, 81st Cong., 1st Sess. (1949), *reprinted in Hearings on H.R. 3191 Before a Special Subcommittee of the House Committee on Education and Labor* (*House Hearings*), 81st Cong., 1st Sess. 7 (1949) (emphasis supplied).[19]

As the italicized words indicate, H.R. 3191 was intended to make the receipt of FECA compensation benefits the only remedy available to FECA beneficiaries on account of an employee's injury or death. There is no evidence in H.R. 3191's original language of any desire to curtail the rights of persons not entitled to compensation benefits under the FECA.

All witnesses who commented on the exclusive remedy provision at the hearings on the 1949 Amendments explained that the provision was directed at employees and persons claiming through them. For example, Mr. J. Donald Kingsley, Acting Administrator of the Federal Security Agency, the agency which drafted the 1949 Amendments, testified that the purpose of § 7(b) was

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[19] The exclusive remedy provision in the original Senate bill, S. 1287, was identical to that in its companion H.R. 3191. S. 1287, § 201, 81st Cong., 1st Sess. (1949), *reprinted in Hearings on S. 239, S. 800, S. 1245, and S. 1287 Before a Subcommittee of the Senate Committee on Labor and Public Welfare: Bills Relative to United States Employees' Compensation Act Amendments (Senate Hearings)*, 81st Cong., 1st Sess. 9 (1949).

"to make the compensation remedy exclusive and thus to avoid the needless threat of litigation under the Tort Claims Act. At the present time, an injured *employee* has the choice of suing the Government or coming in under this present act . . . ." *House Hearings* at 25 (emphasis supplied). See also *Senate Hearings* at 53-54 (statement by Mr. Oscar R. Ewing, Federal Security Administrator, that the exclusivity provision will "eliminate suits against the Government *by employees* . . . ." (emphasis supplied)). Mr. Kingsley further explained that the provision was modeled on the exclusive remedy provisions in the LHWCA and the New York Workmen's Compensation Law. *House Hearings* at 25.

The House Committee on Education and Labor reported H.R. 3191 with minor amendments. The Committee's explanation of the exclusive remedy provision, set out in full in the margin,[20] makes the following

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[20] "Section 201: This section would amend section 7 of the act by designating the present language of that section as subsection '(a)', and by adding a new subsection designated '(b)', the purpose of which would be to make clear that the *right to compensation benefits* under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities which can be enforced by original proceeding in a civil action or in admiralty, or by any proceeding (administrative or judicial) under any other workmen's compensation law or under any Federal tort liability statute.

"Workmen's compensation laws, in general, specify that the remedy provided thereunder shall be *the employee's (or the employee's dependents') exclusive remedy against the employer*, except in those situations where the employer violates the law by failing to insure his compensation liability. The basic theory supporting such provisions is that the *workmen's compensation remedy constitutes a substitute for the employee's former remedy at law for damages against his employer*, including a like remedy available to dependents under death statutes. When the Employees' Compensation Act was enacted in 1916, as a general proposition the United States could not be sued in tort *by its employees or their dependents*. In view of this, provision making the compensation remedy exclusive apparently was then not deemed by the Congress to be necessary. With the creation of corporate instrumentalities of Government and with the passage of various statutes authoriz-

points: (1) when the FECA was enacted in 1916, the United States generally could not be sued in tort by its employees or their dependents; (2) with the subsequent

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ing the bringing of tort actions against the Government, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act—and there may be others—authorize in general terms the bringing of damage actions against the United States. *Federal employees* claiming that these general statutes apply to them, and spurred by the inadequacy of the benefits under the Employee's Compensation Act, have sued the Government under such statutes for injuries received in the course of their employment. Similarly, corporate instrumentalities created by the Government among their powers are authorized to sue and be sued, thus opening the way for the filing of *suits by employees* against such instrumentalities.

"There does not appear to have been any purposeful intention in these instances to give the *Government employees*, or rather some of them, the right to sue the United States, in addition to or as an alternative to the right to workmen's compensation. This matter is of considerable interest to all Government agencies, especially to the corporate instrumentalities. The Reconstruction Finance Corporation, for example, has in the past evidenced particular interest in an amendment of this nature. As the remedy afforded under the Compensation Act, if amended in its benefit provisions as proposed, would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by suit would not only be unnecessary, but would in general be uneconomical, both from the standpoint of the beneficiaries involved and the Government.

"The committee amendment to subsection (b) of section 7 of the act strikes out the phrase 'unless otherwise specifically provided by law' in the language making the compensation right exclusive. The phrase so deleted was intended to make certain that no other act of Congress, now in effect or hereafter enacted, should be construed to confer an additional remedy on employees of the United States in the face of the subsection under discussion, unless such other statute should state specifically that the remedy therein afforded is given in addition to the remedy under the Compensation Act.

"The Federal Security Agency, at the request of the Department of Justice, has informally expressed the view that the deleted phrase is unnecessary and that its inclusion in the subsection might be misconstrued as continuing the effectiveness of such Federal tort statutes as regards employees of the Government, and there-

passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act, federal employees, spurred by the inadequacy of benefits under the FECA, had sued the United States in tort for their compensable injuries; and (3) since compensation benefits under the FECA were being substantially increased in the pending amendments, the remedy provided by the Act would afford employees and their dependents a planned and substantial protection, thus rendering other remedies unnecessary and uneconomical, both from the standpoint of the beneficiaries of the FECA and the Government. As in the hearings, there was no indication in the House Report that § 7(b) would affect the rights of strangers to the compensation scheme.

After the House passed H.R. 3191 as reported by the Committee on Education and Labor, 95 Cong. Rec. 8752-64 (June 30, 1949), the bill went to the Senate Com-

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fore that the exclusiveness of remedy intended might thus be defeated. The committee shares this view. It is the committee's purpose to have the language of such section 7 entirely clear in this respect so as to express the committee's intention that the compensation remedy shall henceforth be *the exclusive remedy of a person protected by this act against the United States*, or against its instrumentalities in cases in which a suable instrumentality is the employer. The other changes made by the committee are merely verbal and are likewise intended for clarity. It should be especially noted that the deletion of the phrase 'wholly owned by it' is not intended to preclude an action in tort for injury or death of an employee against a liable third party (not the employer) which is responsible for the injury or death (see secs. 26 and 27 of the Compensation Act), even though such third party happens to be a federal 'instrumentality' not wholly owned by the United States, for example, a national bank. Nor is this amendment intended to extend coverage under the Compensation Act to employees of Federal instrumentalities not 'wholly owned' by the United States. It is intended rather to avoid the contention that where a remedy is afforded under the Compensation Act, that remedy, though exclusive as against the United States, is not exclusive against a not 'wholly owned' instrumentality in its capacity as such instrumentality or as employer." H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949). (Emphasis supplied).

mittee on Labor and Public Welfare. The Senate Committee revised the language of the House-passed exclusivity provision, adopting the wording eventually enacted into law. The Senate Committee did not suggest, however, that this change in wording was intended to affect the purpose or scope of § 7(b). On the contrary, the Senate Committee's Report, relied on and quoted in full by this Court in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 601-02 n.5 (1963), see note 27, *infra*, emphasized that the purpose of § 7(b) was simply to make the increased compensation benefits available under the Act the exclusive remedy against the United States for employees and their dependents, thus benefiting both the Government and the beneficiaries of the FECA.[21]

Had Congress in 1949 intended to preclude strangers to the compensation scheme from asserting claims for tort indemnity against the Government, it would certainly have expressed that intention. The FECA in 1949, as now, see 5 U.S.C. §§ 8131-8132, permitted employees and their representatives to sue third parties in tort for damages resulting from injuries compensable under the FECA. See, *e.g.*, H.R. Rep. No. 729, 81st Cong., 1st Sess. 15 (1949), *quoted in* note 20, *supra*. By 1949, courts had long recognized that both the Suits in Admiralty Act, 46 U.S.C. § 740 *et seq.*, and the Public Vessels Act, 46 U.S.C. § 781 *et seq.*, authorized the impleader of the United States for contribution or indemnity by a respondent in a maritime suit. See, *e.g.*, *The Cotati*, 2 F.2d 394 (S.D.N.Y. 1923); *The Peerless*, 2 F.2d 395 (S.D.N.Y. 1923); *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 298 F. 331 (S.D.N.Y. 1923). See generally, Rule 56, Rules of Practice for U.S. Courts in Admiralty and Maritime Jurisdiction, *discussed at* 3 Moore's

[21] H.R. 3191, as amended by the Senate Committee, passed the Senate on September 30, 1949, 95 Cong. Rec. 13606-09, and the House on October 6, 1949, 95 Cong. Rec. 14059-60.

Federal Practice ¶ 14.31[2] (1982)[22]; *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 449 & n.3 (1947). Moreover, the legislative history of the Federal Tort Claims Act—enacted only three years earlier—showed that Congress contemplated that suits for tort indemnity and contribution against the United States would arise under that statute. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551 n.8 (1951), *quoting* H.R. Rep. No. 2245, 77th Cong., 2d Sess. 12 (1942); Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 Fed. B.J. 391, 393-395 n.14 (1948); Gottlieb, *The Federal Tort Claims Act*, 35 Geo. L.J. 1, 27-29 & n.83 (1946). In short, third-party actions for tort indemnity and contribution were well-established in 1949. Nevertheless, the 81st Congress failed to provide even a remote indication that these actions were to be barred by § 7(b).

Indeed, contemporaneous and controlling judicial interpretations of the statutory provision on which § 7(b) was modeled indicate that Congress affirmatively intended not to bar tort indemnity claims. Section 7(b) was patterned after a provision of the New York Workmen's Compensation Law.[23] See *House Hearings* at 25 (testimony of J. Donald Kingsley). By 1949 the New York law had been authoritatively construed as not barring claims for tort indemnity against an employer

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[22] In 1966, with the merger of the federal rules of practice in civil and admiralty matters, the substance of old Admiralty Rule 56 became Rule 14(c), Federal Rules of Civil Procedure.

[23] Section 11 of the New York law provided in relevant part as follows: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . ." *Quoted in Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567, 568 (1938).

by a third party liable in tort for an employee's work-related injuries, on the ground that such claims were not "on account of" the employee's death or injury. *E.g.*, *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567, 568 (1938); *Barbara* v. *Stephen Ransom, Inc.*, 79 N.Y.S.2d 438, 440-41 (Sup. Ct. 1948); *Gorham* v. *Arons*, 76 N.Y.S.2d 850, 851-52 (Sup. Ct. 1947); *Clements* v. *Rockefeller*, 70 N.Y.S.2d 146, 149-50 (Sup. Ct. 1947). In selecting the New York law as the model for § 7(b), Congress, it must be presumed, intended the federal statute, like its New York ancestor, to be interpreted as not barring tort indemnity claims.[24] See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-99 (1979) (when Congress models a statute on earlier legislation that has been judicially construed as creating a private right of action, a presumption arises that Congress intended the later statute to also authorize a private right of action). *Cf. Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 275-76 (1980) (because the scheduled benefits provision of the LHWCA was modeled after a provision in the New York workmen's compensation scheme, interpretation of

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[24] Section 7(b) was also patterned after § 5 of the LHWCA. *House Hearings* at 25. As of 1949, most, but not all, of the federal courts that had addressed the issue had concluded that § 5 of the LHWCA did not bar contribution or indemnity claims against a longshoreman's employer by a third party liable in tort for the longshoreman's injuries. See, *e.g.*, *Portel* v. *United States*, 85 F. Supp 458, 462 (S.D.N.Y. 1949); *The S.S. Samovar*, 72 F. Supp. 574, 588-89 (N.D. Cal. 1947); *Christon* v. *United States*, 8 F.R.D. 327, 328 (E.D. Pa. 1947); *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, 305 (D. Me. 1939), *appeal dismissed*, 110 F.2d 234 (1st Cir. 1940). But see *Johnson* v. *United States*, 79 F. Supp. 448, 448-49 (D. Ore. 1948). See also *Porello* v. *United States*, 153 F.2d 605, 607, 609 (2d Cir. 1946), *aff'd in part, rev'd in part*, 330 U.S. 446 (1947) (although initially holding contribution barred by § 5, court on rehearing expressly leaves question open and rests decision on other grounds).

the New York provision by the New York Court of Appeals, even though postdating enactment of the LHWCA, is "enlightening").

Thus, the entire legislative history of the 1949 Amendments demonstrates that the purpose of § 7(b) was to establish that the Government's liability for compensation payments to its employees and their dependents and representatives was to be exclusive of all other liability to these persons on account of a compensable injury or death. There is not a shred of evidence that Congress intended to extinguish the rights of third parties who are unrelated to the compensation scheme and who are not asserting a claim through or on behalf of an employee. See *Weyerhaeuser Steamship Co.* v. *United States*, *supra*, 372 U.S. at 601, *discussed infra* at pp. 31-37. Quite the contrary, Congress modeled § 7(b) on state legislation that had been authoritatively construed to permit claims for tort indemnity.

III. THIS COURT'S DECISION IN *WEYERHAEUSER STEAMSHIP CO.* v. *UNITED STATES* COMPELS THE CONCLUSION THAT SECTION 8116(c) DOES NOT BAR LOCKHEED'S CLAIM FOR TORT INDEMNITY

A. *Weyerhaeuser* Holds That the FECA Does Not Bar a Third Party Who Is Liable for a Federal Employee's Injuries from Recovering Reimbursement from the United States

In *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), this Court held that the limitation-of-liability provision of the FECA does not bar a third party liable for a federal employee's work-related injuries from recovering contribution from the United States pursuant to the admiralty doctrine of divided damages.[25]

[25] Under the now defunct admiralty doctrine of divided damages (also known as the moiety rule), in mutual fault collisions "the entire damage to both ships is added together in one common mass and equally divided between [the parties] and thereupon arises a liability of one party to pay to the other such sum as is necessary

That decision is squarely applicable and requires reversal of the Court of Appeals.

The *Weyerhaeuser* case arose out of a collision between an Army dredge and a vessel owned by Weyerhaeuser. A civilian federal employee aboard the dredge sustained personal injuries in the collision, collected compensation from the United States under the FECA, and then sued Weyerhaeuser for damages. Weyerhaeuser settled the employee's suit for $16,000. *Id.* at 598. In a separate action, Weyerhaeuser sued the United States, pursuant to the Public Vessels Act, 46 U.S.C. § 781 *et seq.*, for the damages it had sustained in the collision, including its settlement payment to the federal employee. The district court found that the collision had occurred through the mutual fault of both vessels and, applying the admiralty contribution rule of divided damages, held that each party was entitled to recover from the other one-half of its damages. Over the Government's objection that § 7(b) of the FECA (now § 8116(c)) barred the award, the district court allowed Weyerhaeuser to recover one-half of the $16,000 it had paid the injured federal employee.[26] *Id.* at 598-99. The Ninth Circuit

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to equalize the burden." *The North Star*, 106 U.S. 17, 22 (1882). The rule also applied in cases where a vessel partly at fault was damaged in a collision or grounding because of the mutually contributing fault of a nonvessel party, *e.g.*, *White Oak Transp. Co.* v. *Boston, Cape Cod & N.Y. Canal Co.*, 258 U.S. 341 (1922), and encompassed not only damage to the vessel or vessels involved but personal injuries and property damage caused innocent third parties as well, *e.g.*, *The Alabama*, 92 U.S. 695 (1876). In *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court replaced the divided damages doctrine with a proportional fault rule.

[26] The FECA had not been codified when *Weyerhaeuser* was decided. The codifiers of Title 5 modified the statute in minor respects not pertinent here. The language of the limitation-of-liability provision before the Court in *Weyerhaeuser* read as follows:

> "The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to

reversed. This Court granted certiorari and in a unanimous opinion held that § 7(b) did not preclude Weyerhaeuser's claim for reimbursement of one-half of the amount it had paid the injured federal worker.

This Court first examined the language of § 7(b). In response to the Government's contention that the plain language of the statute—"anyone otherwise entitled to recover damages from the United States"—barred the shipowner's claim, the Court noted:

> "But the general language upon which the Government relies follows explicit enumeration of specific categories: employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain'." *Id.* at 600-01.

Turning to the legislative history, the Court found that § 7(b) was part of a *quid pro quo* between the Government and its employees and was not intended to affect the rights of unrelated third parties to seek reimbursement from the Government:

> "The legislative history of the Federal Employees' Compensation Act, originally passed in 1916, shows that the concern of Congress was to provide federal

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the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel." 63 Stat. 861-62 (1949).

employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States. *The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." *Id.* at 601 (emphasis supplied).[27]

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[27] In a footnote to this passage, the Court quoted the Senate Report's explanation of § 7(b):

> "Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.
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> "Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in

In sum, after a careful review of the language and legislative history of § 7(b), the Court in *Weyerhaeuser* held that since this statute was directed only at the rights of federal employees and their employer *inter se*, it does not bar third-party claims for reimbursement from the Government for damages paid to an injured federal employee.[28]

Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause *Federal employees* to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits *by employees* against such instrumentalities based upon accidents in employments.

"This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the *beneficiaries involved* and the Government." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949), *quoted in* 372 U.S. at 601-02 n.5 (emphasis supplied by the Court).

[28] The Court in *Weyerhaeuser* also discussed two prior cases interpreting analogous statutes. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), held that a shipowner liable to a longshoreman for work-related injuries was entitled to indemnity from the longshoreman's employer notwithstanding § 5 of the LHWCA, 33 U.S.C. § 905, a provision nearly identical to § 7(b) of the FECA. See note 14, *supra*. The *Weyerhaeuser* Court explained that *Ryan* and its progeny had allowed indemnity because of contractual relationships between the shipowners and the employers authorizing indemnity—although the Court noted that those contractual relationships were often quite attenuated. 372 U.S. at 602-03. Because the indemnity claims were asserted by strangers to the compensation scheme (shipowners) and were based on independent contractual relationships, they were held not barred by § 5 as claims "on account of" an

B. *Weyerhaeuser*'s Interpretation of the FECA Is Not Properly Confined to Admiralty Cases Involving the Divided Damages Doctrine

Although *Weyerhaeuser* arose in a maritime context and dealt specifically with the effect of the FECA upon a shipowner's right to contribution under the admiralty rule of divided damages, the rationale underlying that decision as well as subsequent action taken by this Court compel the conclusion that Lockheed's tort indemnity claim against the Government is not barred by § 8116(c). Moreover, lower court cases which deny indemnity or contribution to third-party tortfeasors and which distinguish *Weyerhaeuser* on the ground of the divided damages doctrine are either inapposite or poorly reasoned.

1. *The Rationale Underlying* Weyerhaeuser *Is Applicable.* This Court in *Weyerhaeuser* held that § 7(b) of the FECA was not intended to alter third-party rights to reimbursement from the Government for damages paid to an injured federal employee. The Court reached that conclusion by (1) reading the general statutory phrase "anyone otherwise entitled" in light of the prior enumeration of specific parties who would claim through or on behalf of an injured or deceased federal worker, and (2) analyzing the legislative history of § 7(b), which

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employee's death or injury. See pages 18-19 and note 14, *supra*. The Court then discussed *The Chattahoochee*, 173 U.S. 540 (1899), a case involving the Harter Act, 46 U.S.C. § 192. That Act provides that where cargo is lost or damaged due to faults in navigation, the cargo owner may not recover damages from the carrying vessel. *The Chattahoochee* held that despite this statutory bar, the carrying vessel could be held liable to a non-carrying vessel, pursuant to the divided damages rule, for one-half of the damages sustained by the non-carrying vessel resulting from its liability to the owner of the cargo on the carrying vessel. The common thread running through *The Chattahoochee*, *Ryan* and *Weyerhaeuser* is that statutes enacted to limit the liability of one party to another should not be construed to deprive unrelated persons of their pre-existing rights to reimbursement. 372 U.S. at 604.

indicated that Congress did not intend to affect the rights of unrelated third parties, but only to regulate the relationship between federal workers and their employer. Because the FECA was so construed, Weyerhaeuser's right to contribution from the United States pursuant to the divided damages doctrine, made applicable to the United States by the Public Vessels Act, was not barred.

Like the private shipowner in *Weyerhaeuser*, Lockheed is a stranger to the federal workmen's compensation system. As such, under the rationale of *Weyerhaeuser*, Lockheed's claim for tort indemnity should not be barred by § 8116(c).

2. *This Court's Order in* Treadwell *Indicates That* Weyerhaeuser *Applies in Non-Maritime Cases.* While *Weyerhaeuser* was pending in this Court, certiorari was sought to review a decision of the Third Circuit holding that the plain language of § 7(b) precludes a party who has been held liable for negligently causing injury to a federal employee from recovering contribution from the Government as a joint tortfeasor. *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962). The claim for reimbursement in *Treadwell* did not rest on admiralty law, much less on the divided damages doctrine. In opposing certiorari, the United States argued that the grant of certiorari in *Weyerhaeuser* furnished no support for issuing the writ in *Treadwell*, since *Weyerhaeuser* was concerned only with the admiralty rule of divided damages. Brief for the United States in Opposition at 6-9, *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). Nevertheless, three weeks after deciding *Weyerhaeuser*, this Court granted certiorari in *Treadwell*, vacated the judgment of the Third Circuit, and remanded the case to the District Court for further consideration in light of *Weyerhaeuser*. *Treadwell Construction Co.* v. *United States*, 372 U.S. 772

(1963).[29] This action indicates that the Court which had so recently decided *Weyerhaeuser* did not intend to confine its interpretation of the FECA to admiralty cases.

3. *Those Cases That Distinguish* Weyerhaeuser *on the Ground of the Divided Damages Doctrine Are Either Inapposite or Poorly Reasoned.* Notwithstanding *Weyerhaeuser*, there exists in the lower courts abundant conflict and confusion as to whether, and the circumstances under which, the FECA operates to defeat claims for tort indemnity or contribution asserted against the Government. Those cases that have denied indemnity or contribution claims can be grouped into two categories: (a) decisions which preclude relief on the theory that the FECA, by removing the Government's underlying tort liability to its employees, destroys a third party's claim under substantive indemnity or contribution law principles; and (b) decisions which hold that the FECA itself bars claims for tort indemnity and contribution regardless of the substantive indemnity or contribution law principles that may be applicable. The first group of cases is inapposite; the second, poorly reasoned.

(a) The leading decision falling within the first category noted above is *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964), a case involving a claim for tort indemnity by a third-party tortfeasor against the United States. The court in *Wiener*, consistent with this Court's ruling in *Weyerhaeuser*, correctly held that the limitation-of-liability provision of the FECA was not intended to, and does not by its own force, bar indemnity claims against

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[29] On remand, the district court ordered contribution. The United States filed an appeal from that order but later moved for dismissal of the appeal on the recommendation of the Solicitor General. See *Hart* v. *Simons*, 223 F. Supp. 109, 111 n.1 (E.D. Pa. 1963).

the Government under the Federal Tort Claims Act. 335 F.2d at 402. The third-party claim in *Wiener*, according to the court, failed for a different reason—namely, that under the Federal Tort Claims Act any right to tort indemnity must be derived from state law;[30] that the applicable state law (Nevada) provided no such right where the putative indemnitor (United States) is not liable in tort to the victim (employee); and that the FECA had removed the Government's underlying liability to its employees. *Id.* at 403. The *Wiener* court distinguished *Weyerhaeuser* on the ground that the law providing a right to contribution in that case—the admiralty rule of divided damages—does not depend on common liability of the two shipowners to the injured party; rather it "is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured." *Id.* at 403.

Unlike the court in *Wiener*, this Court has not been called upon to determine whether, under substantive indemnity law principles, a valid tort indemnity claim requires common liability of Lockheed and the United States to Ms. Bottorff's estate. The Court of Appeals decided that Lockheed's claim for tort indemnity was barred by the FECA itself, because the duties on which that claim was based were "derivative" of the Government's duty of care to its employees. That court did not reach the question whether the applicable substantive law of tort indemnity would have imposed a common liability requirement. See note 6, *supra*.[31] The issue

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[30] The Federal Tort Claims Act provides that the United States is liable for tort claims "in accordance with the law of the place where [its negligent or wrongful] act or omission occurred." 28 U.S.C. § 1346(b).

[31] As the Court of Appeals found it unnecessary to decide whether tort indemnity presupposes common liability, it also did not determine what jurisdiction's substantive law would govern that question.

before this Court is whether the FECA itself bars the present tort indemnity claim—an issue on which *Wiener* provides support for Lockheed, not the Government.

Wiener has gained a following in other circuits. The D.C. and First Circuits applied *Wiener's* "common liability" rationale to bar contribution claims against the Government, although both courts reserved decision on whether tort indemnity also requires underlying tort liability on the part of the Government. *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968); *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969). The Third Circuit applied *Wiener's* rationale to bar claims for both tort contribution and indemnity. *Travelers Insurance Co.* v. *United States*, 493 F.2d 881 (3d Cir. 1974).[32] *Contra Wallenius Bremen, G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970) (disagreeing with *Wiener*'s "common liability" requirement as a matter of substantive indemnity law). As adherents to *Wiener*'s second ruling relating to the substantive law of reimbursement, these decisions do not bear on the question of statutory construction before the Court.

(b) The leading decision in the second line of cases is *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975). In that case, the Second Circuit was presented with a contribution claim against the Government grounded in New York law, which does not require common liability as a

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[32] Unlike the *Wiener* court, the First Circuit in *Newport Air Park* adopted the "common liability" requirement as a matter of federal law, stating that it was determining the extent of an immunity created by the FECA. 419 F.2d at 346-47. By contrast, the D.C. Circuit in *Murray* appears to have based the requirement of common liability upon District of Columbia, not federal, law. See 405 F.2d at 1363-64. The *Travelers* decision does not make clear whether the "common liability" requirement it applied derives from federal or state law.

prerequisite for contribution or tort indemnity.[33] That court held that the FECA itself barred the claim against the Government. *Weyerhaeuser* was distinguished on the ground that it involved the admiralty rule of divided damages, but the court of appeals gave no explanation of how that distinction bore on the issue of statutory construction. *Galimi* was followed by the Seventh Circuit in *Kudelka* v. *American Hoist & Derrick Co.*, 541 F.2d 651, 658-59 (7th Cir. 1976).[34] *Contra Wallenius Bremen, G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); *Sandoval* v. *Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163, 1168-69 (5th Cir. 1972).

In the case at bar, the Court of Appeals, like the courts in *Galimi* and *Kudelka*, held that the statute of its own force bars Lockheed's tort indemnity claim. In reaching its holding, the court focused on the language of the predecessor to § 8116(c), which precluded certain claims against the Government "on account of" an employee's injury or death.[35] The court deemed the tort duties owing to Lockheed by the Government and underlying Lockheed's indemnity claim to be derivative of duties of care owed by the Government to its employees

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[33] *Dole* v. *Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[34] *Kudelka* arose in Illinois, which, like New York, does not deem common liability a prerequisite to contribution or tort indemnity. *E.g.*, *Miller* v. *DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630, 640-41 (1967); *Skinner* v. *Reed-Prentice Div. Package Mach. Co.*, 70 Ill.2d 1, 374 N.E.2d 437, *cert. denied*, 436 U.S. 946 (1978).

[35] Section 8116(c) bars certain claims against the Government which arise "because of" an employee's injury or death. In reaching its holding that Lockheed's tort indemnity claim was barred by § 8116(c), however, the court below quoted from a passage in 2A A. Larson, Workmen's Compensation Law § 76.44 at 14-405 (1976), which discusses generally workmen's compensation statutes that preclude claims which arise "on account of" an employee's injury or death. (Pet. App. 8a; 665 F.2d at 1333-34).

and thus concluded that Lockheed's claim was "on account of" the death of the employee. (Pet. App. 6a-8a; 665 F.2d at 1333-34).

The distinction between "derivative" and "independent" duties asserted by the court below can find no support in the statute as construed by *Weyerhaeuser*. First, as explained above, see pp. 31-37, *Weyerhaeuser* held that the FECA's limitation-of-liability provision does not affect the reimbursement rights of strangers to the compensation scheme; it did not hold that, to avoid the FECA's bar, reimbursement rights must be based on an independent duty. Second, the relevant duty breached by the United States in *Weyerhaeuser* is at least as "derivative" as the duties on which Lockheed's claim is based. The only disputed issue in *Weyerhaeuser* was whether the private shipowner could compel contribution from the Government with respect to the damages paid an injured federal employee. As to that issue, the duty of safe navigation owed by the Government as shipowner to the private shipowner (Weyerhaeuser) was simply the duty to avoid the imposition of liability upon the private shipowner through the Government's faulty navigation. Thus, the contribution claim in *Weyerhaeuser*, like Lockheed's indemnity claim, was premised upon a duty to avoid imposing foreseeable liability on another through one's own negligence.[36] In other words, Weyerhaeuser's contribution claim based on the duty of safe navigation bears the same relationship to the Government's breach of the duty of care owing to its employees as Lockheed's indemnity claim bears to the Government's breach of the duty of care owing to its employees. See generally *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F.2d 322, 325 (2d Cir. 1950) (L. Hand, J., concurring).

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[36] The duty to use due care to avoid imposing foreseeable liability on another is actually independent of the duty of care owed a tort victim. See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), discussed *supra* at pp. 22-23.

In sum, *Weyerhaeuser*'s interpretation of the FECA is directly on point and requires reversal of the Court of Appeals.[37]

IV. IN ENACTING SECTION 8116(c), CONGRESS DID NOT IMPLIEDLY REPEAL THE FEDERAL TORT CLAIMS ACT'S WAIVER OF GOVERNMENTAL IMMUNITY IN INDEMNITY SUITS OR ABROGATE SOUND PRINCIPLES OF PUBLIC POLICY

The Federal Tort Claims Act waives the Government's immunity from suit for tort indemnity. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). In the present case, the Court of Appeals has construed § 8116(c) as *pro tanto* nullifying that waiver. In so interpreting the FECA, that court has completely disregarded the cardinal rule of statutory construction that "repeals by implication are disfavored." *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

This Court has long recognized that, absent specific statutory language nullifying a prior enactment, an earlier statute will be deemed repealed by a later one only when "the intention of the legislature to repeal [is] clear and manifest." *TVA* v. *Hill*, 437 U.S. 153, 189 (1978), *quoting Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). The Court has been especially careful not to infer that Congress has silently repealed or limited legislation that waives the Government's immunity from suit. Thus, in the *Regional Rail Reorgan-*

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[37] The doctrine of *stare decisis* is of particular force "when the questions are of statutory construction, not of constitutional import," because of the possibility of legislative correction. *United States* v. *South Buffalo Ry.*, 333 U.S. 771, 774-75 (1948). Although Congress has amended the FECA several times since 1963, 80 Stat. 378, 531-56 (1966), 81 Stat. 195 (1967), 88 Stat. 1143 (1974), 94 Stat. 2608 (1980), it has not made any substantive amendment to the limitation-of-liability provision, nor has it in any other way disapproved of the interpretation adopted in *Weyerhaeuser*.

ization Act Cases, 419 U.S. 102 (1974), the Court held that the Tucker Act had not been impliedly qualified:

> "Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end." *Id.* at 134, *quoting In re Penn Central Transportation Co.*, 384 F. Supp. 895, 943 (Regional Rail Reorg. Ct. 1974).

See generally *Kremer* v. *Chemical Construction Corp.*, 50 U.S.L.W. 4487 (U.S. May 17, 1982).

The language and legislative history of § 8116(c) evince a congressional intent to make the receipt of compensation benefits under the FECA the exclusive remedy against the United States for employees and persons claiming under them, and thus to bar such persons from instituting civil actions for damages against the Government under federal tort liability statutes. As demonstrated previously, however, the statutory language and legislative history reflect only that limited purpose. There is no evidence in the statute's language or its legislative history that Congress was concerned with the rights and remedies of third parties unrelated to the compensation system; nor does any basis exist for inferring that Congress wished to preclude the assertion of tort indemnity claims arising out of the Government's breach of independent duties owed to third parties. Indeed, the probative evidence bearing upon Congress' intent in this regard indicates that Congress did not desire through § 8116(c) to abolish the Government's amenability to suit by third-party claimants. See pp. 29-31, *supra*. Consequently, a construction of § 8116(c) which impliedly re-

peals in part the Tort Claims Act's waiver of the Government's immunity from tort indemnity suits should not be sanctioned by this Court.

Such a construction of § 8116(c) is also unwarranted because it would produce significant inequities. Employees (and their survivors) who are precluded by § 8116(c) from instituting damages actions against the Government have received a distinct benefit in exchange for relinquishing their prior litigation rights—swift and assured compensation for work-related injuries and deaths. On the other hand, third-parties such as Lockheed who must respond to employees' damages claims have not been granted any remedies or benefits whatsoever by the FECA compensation system. Yet, under the Court of Appeals' interpretation of § 8116(c), any common-law or statutory rights possessed by such third-parties to shift all or part of the burden of a tort judgment to the United States have been deemed to have been abrogated by the FECA. In effect, therefore, under the Court of Appeals' construction of § 8116(c), third-parties are forced to subsidize a compensation scheme to which they are not parties and from which they gain no benefit.

The unfairness inherent in barring third-party indemnity claims against the Government is compounded when an employee's injury or death results from an allegedly defective product. Under modern tort law principles, a product manufacturer may be held liable to an injured party even if it is completely without fault. See, *e.g.*, *Restatement (Second) of the Law of Torts* § 402A. Yet, under the Court of Appeals' construction of § 8116(c), a private manufacturer cannot seek tort indemnity from the Government even though, as here, the Government actively participated in the production and testing of the product and even though the Government's negligent mis-

use and improper maintenance of the product constituted the primary cause of harm to its employees.[38]

In the case at bar, the uncontested evidence shows that the United States actively participated in the design, development and testing of the C-5A; adopted regulations which detailed proper rigging procedures and then tolerated recurrent violations of those regulations; neglected to maintain on hand adequate quantities of spare parts to prevent cannibalization; failed to inform Lockheed about incidents calling into question the safety of the C-5A; refused to provide Air Force mechanics with adequate training in order to correct a high degree of misrigging and cannibalization, even though Lockheed called to its attention the need for special instructional programs in this regard; and failed to use available passenger safety equipment. These admitted acts and omissions directly caused the accident that took Ms. Bottorff's life. Nevertheless, if the Government's reading of § 8116(c) is sustained, Lockheed will be required to bear the entire financial responsibility for this loss, as well as for the losses sustained by other FECA beneficiaries.[39]

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[38] In the typical products liability case, the manufacturer has complete control over the design, testing, and manufacture of the product that injures the consumer or user. By contrast, in the field of government procurement, the Government often dictates to the manufacturer on matters of design and testing that may affect the safety of the product. See, *e.g.*, *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 667-68 (1977). See also pp. 6-7, *supra*.

[39] The conclusion that Congress did not intend through § 8116(c) to bar tort indemnity claims against the Government is also supported by another provision of the FECA, 5 U.S.C. § 8132. Section 8132 in general requires that federal employees (or their survivors) who recover damages from third parties on account of work-related injuries refund to the United States the amount of benefits paid to them under the FECA. If the Government's interpretation of § 8116(c) is adopted, third-party claimants will in effect be required not only to respond for those damages suffered by

The Court of Appeals' construction of § 8116(c) produces two other results that Congress could not have intended: it exposes employees to greater safety risks and the Government to greater procurement costs. To the extent that the expenses associated with accidents are not borne by those responsible for their occurrence, no financial incentive will exist for tortfeasors to take precautionary measures that might avoid such accidents in the future and thereby eliminate the social costs incident to them.[40] Indeed, for this very reason, "[t]he approach of the indemnity cases in this Court" arising under the LHWCA has been to place financial responsi-

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injured employees, but also to indemnify the Government for its expenditures—even if the Government is primarily responsible for an employee's injuries. Professors Hart and Sacks, in discussing comparable provisions of the LHWCA, have pointed out the absurdity of such a result:

> "The national legislature, we are to suppose, made a deliberate decision that the third person—when there was one—should be left holding the bag for both employer and employee. In pursuance of a Congressional purpose to sweeten up the *quid pro quo* even for negligent employers, the third person was to be deprived of the right of contribution which the principles of the preexisting general law plainly gave him, with no *quid* in return for his *quo* whatever. And this was to be accomplished, *inter alia*, by presenting the legal world with the theretofore unheard of spectacle of a negligent [employer] recovering from [a third-party tortfeasor] not merely half his damages but the whole of them—on the excuse that a surplus might be produced which would benefit the . . . employee. The third person unfortunate enough to injure a beneficiary of a compensation act, in other words, was to be the gratuitous statutory indemnitor of the beneficiary's wrongdoing employer." Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 529 (Tent. ed. 1958).

[40] See U.S. Dep't of Commerce, *Interagency Task Force on Product Liability: Final Report*, p. VII-90 (1977) ("[T]o the extent that the costs of accidents are not internalized . . . , employers will under-invest in safety and health.")

bility on the person "in the best position to avoid accidents." *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156, 171 (1981). The principle is no less important in the field of government procurement. Once a product has been delivered to the United States, the manufacturer can warn the Government of the need for additional care in its handling or operation (as Lockheed did here), but the Government makes the final decision as to whether the proposed safety measures are warranted in light of the anticipated costs and benefits of implementing them.

Finally, under the Court of Appeals' interpretation of § 8116(c), persons contracting with the Federal Government will be required to wholly assume the risk of damages liability to federal employees who are injured or killed in accidents caused by the active and primary negligence of the United States. As a result, the costs of doing business with the Government—including the costs of obtaining insurance, if insurance is available—will be increased substantially. For this reason, many firms (especially those unable readily to obtain insurance against such risks at a reasonable rate) may not bid on Government contracts, thus reducing competition in the provision of goods and services to the Government. Those firms that do continue to seek such contracts will, of course, attempt to pass along their increased costs to the Government, thus increasing the Government's own expenses. Indeed, in light of this passing on of costs, and because a proper allocation of tort liability risks will reduce the incidence of accidents, the Government's purse may be better protected in the long run by the allowance of tort indemnity claims to the extent permitted by the applicable substantive law of indemnity.

In sum, a construction of § 8116(c) that bars tort indemnity not only lacks a basis in the statute's language and legislative history, but also produces many in-

equitable and undesirable consequences that Congress cannot be presumed to have intended when it enacted § 8116(c).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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June 18, 1982

Respondent's Brief

Office - Supreme Court, U.S.
FILED
AUG 27 1982
CLERK

No. 81-1181

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a joint tortfeasor in the wrongful death of a federal employee is barred by the exclusive liability provision of the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), from suing the United States for indemnity.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 665 F.2d 1330. The order of the district court granting summary judgment (Pet. App. 9a-10a) is not reported. The district court's order refers to two earlier district court decisions (Pet. App. 11a-19a, 20a-32a), the latter of which is reported at 476 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on September 30, 1981. The petition for a writ of certiorari was filed on December 23, 1981, and was granted on April 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 8116(c), provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

1. *Background and Proceedings Below*

This case arose out of a 1975 plane crash near Saigon, South Vietnam. The aircraft involved was a C-5A cargo plane manufactured by petitioner, Lockheed Aircraft Corporation, pursuant to a contract with the United States Air Force. On April 4, 1975, Air Force personnel landed the aircraft in Saigon with a cargo of military equipment. Following discharge of the cargo the aircraft took on approximately 300 passengers as part of an emergency evacuation of individuals out of Vietnam. Some time after takeoff the aft cargo door and the aft ramp separated from the aircraft. Hydraulic lines and control cables running to the tail of the aircraft were severed (J.A. 69-70, 99). The pilot attempted to return to Saigon, but the plane crashed several miles short of the Saigon airport, killing 144 of the passengers (J.A. 100).

One of the passengers killed in the crash was Ann Nash Bottorff, a civilian employee of the Depart-

ment of the Navy (J.A. 4-5). Bottorff's survivors received death benefits from the United States under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* (J.A. 103). On November 4, 1975, the administrator of Bottorff's estate filed suit against petitioner seeking damages for her wrongful death and for injuries suffered prior to her death (J.A. 4-17).[1]

On January 9, 1976, petitioner impleaded the United States as a third-party defendant, seeking indemnity or contribution on a variety of theories (J.A. 25-34). Counts I and II of petitioner's third-party complaint asserted a right to indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; Counts III and IV sought indemnity or contribution under the Suits in Admiralty Act, 46 U.S.C. 740 *et seq.*, and the Public Vessels Act, 46 U.S.C. 781 *et seq.*; and Count V was a claim for contractual indemnity pursuant to a 1971 contract between petitioner and the government relating to manufacture, sale and delivery of C-5A aircraft. Only petitioner's claim for indemnity under the FTCA is at issue before this Court (Pet. 6 n.6, 7 n.9). Neither the district court nor the court of appeals reached petitioner's admiralty law claims (Pet. App. 8a n.5, 10a). Petitioner abandoned its claim for contractual indemnity at the district court stage (*id.* at 3a n.2).[2]

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[1] By agreement of the parties, the ruling in this case will govern petitioner's indemnity claims respecting other civilian government employees who were killed or injured in the plane crash.

[2] The Tucker Act, 28 U.S.C. 1346(a)(2), requires a contract claim against the United States in excess of $10,000 to be presented in the Court of Claims.

In the fall of 1979 petitioner settled the claims asserted against it by Bottorff's estate. Petitioner then moved for summary judgment against the government in the third-party action (J.A. 88-89). The government simultaneously filed a motion to dismiss on the ground that recovery under the FTCA is precluded by the exclusive liability provision of the FECA, 5 U.S.C. 8116(c) (J.A. 90-91). The parties also filed a joint statement of material facts not in dispute (J.A. 92-104). On December 7, 1979, the district court entered an order granting petitioner's motion for summary judgment and implicitly denying the government's motion to dismiss (Pet. App. 9a-10a).[3] The district court held that petitioner was entitled to indemnity from the government and that petitioner's claim over was not barred by the FECA (*ibid.*). On January 23, 1980, the district court entered a final judgment in which it confirmed its order of December 7, 1979, and ordered that "defendant recover by way of indemnity and/or contribution from third party defendant United States a proportion, to be agreed upon between defendant Lockheed and third party defendant United States, of the total amount of the settlement between [Bottorff's estate] and defendant Lockheed * * *" (J.A. 105-106).[4]

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[3] The court's order referred to its earlier opinion, dated May 19, 1978 (Pet. App. 11a-19a), in which the court had considered the effect of Section 8116 on petitioner's third-party action.

[4] Petitioner and the government previously had entered into two agreements, which were filed in the district court under seal pursuant to a protective order. Those agreements dealt with petitioner's right to recover from the government for judgments entered against petitioner or settlement payments made by petitioner in cases arising out of the plane

The government appealed, and the court of appeals reversed (Pet. App. 1a-8a). The court of appeals found in 5 U.S.C. 8116(c) a clear intention to prohibit claims under the FTCA for contribution or indemnity that merely derived from duties owed by the government to its employees. The court held that two of the duties alleged by petitioner—the duty to use the aircraft in the manner contemplated by the parties and the duty to maintain the aircraft adequately to prevent accidents—did not run to petitioner, but were "clearly derivative and based upon the duties owed by the Government to its employees and passengers" (Pet. App. 7a). The court concluded that the third duty alleged by petitioner—the duty to provide petitioner with information about safety incidents—sounded in contract rather than tort and thus had been abandoned by petitioner in the district court. The court of appeals declined to find any independent duty running from a purchaser to a manufacturer to use a product in such a way as not to bring liability upon the latter (*id.* at 6a-7a). With respect to petitioner's claim for contribution, the court held that "no right of contribution exists 'unless there is a joint liability of both parties to the injured person'" (*id.* at 5a). Thus, because the FECA had displaced the government's tort liability for injuries to its own employees, petitioner had no right to contribution.[5] The court of appeals remanded the case to the district court for a determination of jurisdiction over petitioner's maritime law claims

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crash in the event that petitioner's third-party claim were found to be valid. The "proportion to be agreed upon," mentioned in the district court's final judgment, referred to the proportion established by these agreements.

[5] At this stage petitioner does not contest the disposition of its claim for contribution (Pet. 7 n.9).

and a decision about the effect of the FECA on such claims (*id.* at 8a n.5).

2. *Current Posture of the Case*

This section is included because we believe the Court should be aware of the somewhat unusual posture of this case. As described above, petitioner's third-party complaint included two counts based on the Federal Tort Claims Act and two counts based on the Suits in Admiralty Act.[6] The two sets of counts must be regarded as mutually exclusive alternatives, since, by its terms, the Federal Tort Claims Act does not waive sovereign immunity with respect to any claim for which a remedy is provided by the Suits in Admiralty Act. See 28 U.S.C. 2680(d). In the district court petitioner contended that jurisdiction of its third-party action was properly based on the Suits in Admiralty Act, while the government contended that petitioner's claims were not of a maritime nature and thus were cognizable, if at all, under the Federal Tort Claims Act. See C.A. App. 155-160, 216-218.[7]

In its order granting petitioner's motion for summary judgment, entered on December 7, 1979 (Pet. App. 9a-10a), the district court concluded that indemnity was available to petitioner (presumably under the Federal Tort Claims Act) and that petitioner's claim over against the government was not barred by the FECA. The order also stated that the court had reached no conclusion with respect to

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[6] Petitioner's third-party complaint included a fifth count based on a contractual indemnity theory, but petitioner abandoned this claim at the district court stage. See page 3 & note 2, *supra*.

[7] "C.A. App." refers to the joint appendix filed in the court of appeals.

whether jurisdiction existed independently under the Suits in Admiralty Act (*id.* at 10a). It is unclear whether the district court was aware of the fact that if petitioner had a remedy under the Suits in Admiralty Act it would be precluded from recovering on a claim under the FTCA.

On January 23, 1980, the district court filed a final judgment confirming the December 7, 1979, order and adjudging that petitioner recover by way of indemnity and/or contribution an amount to be agreed upon between petitioner and the government (J.A. 105-106). The government appealed from that final judgment. The parties proceeded in the court of appeals on the premise that the district court had found jurisdiction under the FTCA, and their arguments focused on whether the FECA constitutes a bar to third-party actions under the FTCA. However, both parties noted in their briefs in the court of appeals that the district court had not reached petitioner's maritime claims, and the parties presented their positions on the existence of admiralty jurisdiction in footnotes to their briefs (see Pet. App. 8a n.5).

The court of appeals held that the FECA constituted a bar to petitioner's claim for contribution or indemnity, apparently referring to such claims under the FTCA. The court of appeals therefore reversed the district court judgment and remanded the case. In a footnote, the court of appeals declined to decide whether petitioner could obtain relief under maritime principles. The court of appeals apparently expected that the district court would consider the issue of admiralty jurisdiction on remand, since it stated that "[e]ven if admiralty jurisdiction is appropriate, of course, the district court should examine with care the intersection of such jurisdiction with the ex-

clusivity provision found in FECA" (Pet. App. 8a n.5).

The petition for certiorari raises only the issue of whether Section 8116(c) of the FECA bars an indemnity claim under the Federal Tort Claims Act. However, if this Court should hold that the FECA does create such a bar, petitioner presumably would request that the case be remanded to the district court for a decision on whether there is jurisdiction of its claims under the Suits in Admiralty Act. If such a remand should occur, and if the district court should conclude that admiralty jurisdiction does exist, then, by the terms of the FTCA, petitioner would never have had a claim under the FTCA, and this Court's resolution of the question currently presented would have been unnecessary. While we believe that such an outcome is highly unlikely, it is at least a possibility.

In light of our position, which we have held consistently and which we believe to be well-founded, that petitioner lacks a remedy under the Suits in Admiralty Act, we believe it appropriate for this Court to proceed with consideration of the question on which it granted certiorari. However, given the posture of the case, the Court may wish to consider dismissal of the petition as improvidently granted. The effect of such a dismissal would be to leave standing the court of appeals' judgment, which included a remand of the case to the district court for further proceedings (Pet. App. 33a-34a). Thus, a dismissal would result in a decision by the district court on whether petitioner has a remedy under the Suits in Admiralty Act.[8]

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[8] If the district court were to hold that petitioner lacks a remedy under the Suits in Admiralty Act, petitioner could appeal that holding. If the court of appeals then affirmed the

SUMMARY OF ARGUMENT

1. The language of 5 U.S.C. 8116(c) and the legislative intent underlying that section support the conclusion of the court of appeals that the FECA bars petitioner's third-party claim against the United States.

a. Section 8116(c) provides that the liability of the United States for employment-connected injuries or death is limited to its obligation to provide statutory compensation. Nothing in that section explicitly excepts third parties from this broad limitation on the government's liability. Because waivers of sovereign immunity must be strictly construed and may not be implied, it must be presumed that Congress did not intend to except third party claims from the limited liability principle expressed in Section 8116(c).

Exclusion of the government's liability under Section 8116(c) extends not only to employees and their beneficiaries, but also to "any other person otherwise entitled to recover damages" from the government. The phrase "any other person" is broad and unqualified, clearly encompassing third parties such as petitioner. Moreover, the entire tone of Section 8116(c), with its references to "all other liability" and "any other person," indicates that the section was intended to be comprehensive in its exclusion of liability. It would be inappropriate to apply the principle of *ejusdem generis* to restrict the statutory language, because it would produce a result that is out of harmony with the limited liability feature of the compensation scheme.

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district court's conclusion that no remedy is available under the Suits in Admiralty Act, petitioner would be free again to petition for certiorari on the question that is currently before this Court.

The liability excluded under Section 8116(c) is that which arises "because of" a federal employee's injury or death. The court of appeals correctly found that petitioner's claims, which are based on the theory that the government's alleged "active" negligence was the primary cause of Bottorff's death, arose "because of" her death. If Bottorff had not been fatally injured, petitioner would not have had a claim for damages against the United States. This conclusion is not inconsistent with *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963). The Court held in *Weyerhaeuser* only that Congress did not intend the exclusive liability provision of the FECA to qualify the long-standing admiralty rule of divided damages in mutual fault collisions. *Weyerhaeuser* is not authority for the broad proposition that the FECA does not bar a third party's indemnity claim. The courts of appeals have recognized this distinction and have repeatedly rejected third-party claims such as the one advanced by petitioner.

Petitioner asserts that there is a broadly defined exception to the general bar on third-party claims for cases in which the government owes the third party an "independent duty." This Court has not identified such an exception to the exclusive liability principle of the FECA, and the lower courts have not clearly defined either the existence or the scope of such an exception. In any event, a broad "independent duty" exception should be rejected because it would undermine the congressional intent in enacting Section 8116(c) to limit the government's liability as a result of employment-related accidents.

b. The legislative history of Section 8116(c) and the overall statutory scheme confirm the conclusion that third-party claims are barred by the FECA. Although Congress did not expressly refer to third-party claims in amending the FECA in 1949, that

silence does not suggest approval of such claims. Rather, it shows only that Congress's attention was focused on the then-prevailing problem of suits initiated by federal employees and their representatives.

The legislative history stresses the importance of limiting the overall monetary liability of the United States. This important congressional objective would be frustrated if third-party claims were permitted, since such claims subject the government to the same potential damages liability and litigation expenses as claims by federal employees. On more than one occasion this Court has rejected third-party claims on the ground that permitting such claims would effectively nullify the limited liability feature of a statutory compensation scheme. See *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 112-115 (1974) (explaining the Court's rejection of third-party contribution claims against employers covered by the Longshoremen's and Harbor Workers' Compensation Act); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977) (explaining that allowing third-party claims would circumvent the limited liability feature of the Veterans' Benefits Act). This concern applies with equal or greater force in the case of the FECA.

2. Even if this Court accepts petitioner's argument that there is a broadly defined exception to the exclusive liability principle of Section 8116(c) for cases involving an "independent duty" owed by the government to a third party, petitioner has not demonstrated that such an independent duty exists in the present case. The court of appeals correctly concluded that the duties alleged by petitioner were not "independent," but were based on the government's duty to its employees and passengers. Petitioner did not present this conclusion as a question for review by this Court in the petition for certiorari

and thus has waived its opportunity to raise the issue.

In any event, it is clear that the court of appeals was correct in concluding that petitioner's third-party complaint does not allege the breach of any independent duty. At the trial level petitioner framed its third-party claim solely in terms of duties owed by the government to Bottorff. Petitioner's attempt on appeal to reframe its claim in terms of an independent duty cannot erase the essentially derivative nature of the claim.

ARGUMENT

The Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, originally passed in 1916, establishes a comprehensive workers' compensation scheme under which federal employees or their survivors receive benefits, regardless of considerations of fault, for employment-connected injuries or death. In 1949 Congress increased significantly the level of benefits available under the FECA and also amended the FECA to provide expressly that the government's liability for employment-connected injuries or death would be limited to its obligation to provide statutory compensation. The exclusive liability provision, now codified at 5 U.S.C. 8116(c), provides assurance to the government that it will not be faced with ordinary tort liability for any employee injuries or deaths covered by the compensation scheme.

Section 8116(c) reads as follows:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instru-

> mentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

This provision excludes liability not only to federal employees and their beneficiaries, but also to "any other person otherwise entitled to recover from the United States * * * because of the injury or death * * *." The court of appeals correctly held that the unqualified language of the provision bars petitioner's third-party action under the Federal Tort Claims Act seeking indemnity from the government for damages paid to the estate of Ann Nash Bottorff, a federal employee who died in the crash of an Air Force airplane. With the exception of the Fourth Circuit, every other court of appeals that has considered the question also has concluded that the effect of Section 8116(c) is to bar third-party FTCA actions against the government.[9]

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[9] See *Kudelka* v. *American Hoist & Derrick Co.*, 541 F.2d 651 (7th Cir. 1976) (indemnity); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975) (contribution); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881 (3d Cir. 1974) (indemnity and contribution); *Newport Air Park, Inc.* v. *United States*, 419 F.2d 343 (1st Cir. 1969) (contribution); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968) (contribution); *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967) (indemnity); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (indemnity); *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373 (E.D.N.Y.), aff'd, 505 F.2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975) (indemnity and contribution); *Panico* v. *Whiting Milk Co.*, 335 F. Supp. 315 (D. Mass. 1971) (indemnity and contribution); *Burney* v. *Washington*, 225 F. Supp. 416 (D.D.C. 1964)) (contribution); cf. *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1967)

Despite this statutory and judicial authority, petitioner urges this Court to hold that it and other third parties alleged to be jointly responsible with the government for the injuries or death of a federal employee may sue the government for all or part of any damages paid to the employee. Petitioner's argument conflicts with the well-established rule that waivers of sovereign immunity must be unequivocally expressed and strictly construed, and that such waivers may not be implied. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The language of Section 8116(c) does not permit third-party claims, but rather precludes them. Moreover, the new rule sought by petitioner would frustrate the congressionally mandated limitation of liability established by Section 8116(c) and would be out of harmony with prior decisions in which this Court has addressed the relationship between third-party claims and statutory compensation schemes. Therefore, petitioner's proposal should be rejected.

I. THE LANGUAGE OF 5 U.S.C. 8116(c) AND THE LEGISLATIVE INTENT UNDERLYING IT SUPPORT THE CONCLUSION THAT THE FECA BARS THIRD-PARTY CLAIMS FOR DAMAGES PAID TO FEDERAL EMPLOYEES IN CONNECTION WITH WORK-RELATED INJURIES OR DEATHS

A. The Language of Section 8116(c) of the FECA Precludes Third-Party Claims for Damages Paid to Federal Employees in Connection With Work-Related Injuries or Deaths

The court of appeals correctly concluded that the language of Section 8116(c) bars petitioner's third-

(approving *Wiener* in context of third-party contribution claim relating to injury of a serviceman). Contra, *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970) (indemnity).

party claim. That section establishes in broad terms a limitation on the liability of the United States for work-related injuries and deaths of federal employees. Nothing in Section 8116(c) explicitly excepts third parties from this broad limitation on liability. Nor does the Federal Tort Claims Act expressly indicate that Congress intended to permit third-party claims for damages paid to federal employees in connection with employment-connected injuries or deaths.

The FTCA, like other waivers of sovereign immunity, must be strictly construed. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Thus, in the absence of an explicit exception from the limited liability principle contained in Section 8116(c), it must be presumed that Congress did not intend to waive sovereign immunity with respect to third-party claims for damages paid to federal employees in connection with employment-related injuries or deaths.

Contrary to petitioner's contentions, the language of Section 8116(c) itself bars claims such as petitioner's. Petitioner comes within the phrase "any other person," as used in Section 8116(c); in addition, petitioner's claim arises "because of" the fatal injury to Bottorff.

1. ***Petitioner Comes Within the Phrase "Any Other Person," as That Phrase Is Used in Section 8116(c)***

Section 8116(c) extends not only to a federal employee and other specified individuals who could claim compensation as a result of injury or death to the employee, but also to "any other person otherwise entitled to recover damages from the United States." As the Second Circuit has noted, the reference to "any other person," read literally, plainly covers those

who are not related to the employee. See *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953 (1975).

Moreover, the tone of the section as a whole suggests that Congress meant the exclusion of the government's liability to be comprehensive. Section 8116(c) states that the liability of the United States under the FECA shall be "exclusive" and instead of "all other liability," not only to the employee and those related to him, but also to "any other person otherwise entitled to recover damages" from the government in a wide range of actions, including a proceeding "under a Federal tort liability statute." Congress could not have chosen more expansive or all-inclusive language. In particular, the references to "all other liability" and "any other person" suggest that no exceptions were intended. Section 8116(c) mentions only one specific exception, which is addressed not to third parties, but rather to seamen. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). Hence, the unequivocal language of the section suggests that Congress intended it to be a complete limitation on the government's liability as a result of a work-related accident suffered by a federal employee.

Petitioner cites the canon of statutory construction known as *ejusdem generis* to support its argument that third parties are not included within the meaning of the term "any other person" (Pet. Br. 17-18). This principle, like other "generalized axioms of experience in construing legislation" (*United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)), may have relevance in some contexts, but, as petitioner acknowledges, its application is not appropriate in all instances. In this case, use of the phrase "any other person," rather than simply "other persons" or "any other similarly situated person," indicates that Congress intended the exclusion of liability to be comprehensive. In *Harrison* v. *PPG In-*

dustries, Inc., 446 U.S. 578 (1980), for example, the Court concluded that it was inappropriate to apply the rule of *ejusdem generis* to limit the meaning of the phrase "any other final action" in Section 307(b)(1) of the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. IV) 7607(b)(1). The Court characterized Congress's language as "expansive," observing that Congress had expanded the ambit of the statute "to include not simply 'other final action,' but rather '*any* other final action.'" 446 U.S. at 589 (emphasis in original). The Court held that "the phrase 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." *Ibid.* (emphasis in original). Similar reasoning applies to Congress's use of the term "any other person" in Section 8116(c).

Moreover, application of the *ejusdem generis* principle here would frustrate the limited liability feature of the statutory scheme. As this Court indicated in *Gooch* v. *United States*, 297 U.S. 124, 128 (1936), cited by petitioner (Pet. Br. 17), the principle of *ejusdem generis* should not be applied to prevent the choice of "that sense of the words which best harmonizes with the context and the end in view."[10] In this

[10] In *Gooch* the Court determined that inclusion of the broad term "otherwise" in a statute that prohibited the holding of a person "for ransom or reward *or otherwise*" required the conclusion that holding an officer to prevent the captor's arrest was covered by the statute. 297 U.S. at 126, 128. *Third National Bank* v. *Impac Ltd., Inc.*, 432 U.S. 312 (1977), also cited by petitioner (Pet. Br. 17), did not involve a comprehensive term placed at the end of a list. Instead, the Court was concerned with the meaning of the term "injunction," which had been "sandwiched in" between statutory references to "attachment" and "execution." The Court found it appropriate to look not only to the nearby words, but also to the

case, as we discuss below (see pages 33-42, *infra*), it is the exclusion of third-party claims that best harmonizes with the context and the purpose of Section 8116(c) to limit the overall liability of the United States. See also *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975) (rejecting application of the rule of *ejusdem generis* because "[t]o narrow the meaning of the language Congress used * * * would not comport with [the statutory] purpose").

Petitioner contends (Pet. Br. 17) that this Court in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 600-601 (1963), recognized that the phrase "any other person" in the exclusive liability provision of the FECA "must be construed in light of the statute's prior enumeration of specified persons." This Court did not so state in *Weyerhaeuser*. Instead, the Court indicated that, in light of the traditional rule of statutory construction (*i.e.*, *ejusdem generis*), the meaning of the statutory language could not be described as "plain." *Id.* at 601. This observation is not conclusive of the meaning of the language. Even if the words themselves do not indicate a plain meaning, the overall statutory scheme may give meaning to the words. In view of the fact that permitting third-party claims against the United States would frustrate the overall purpose of Section 8116(c), it would be inappropriate to apply the principle of

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general context and purpose of the statute, in order to determine the proper meaning of the term. *Id.* at 322-323. Neither case cited by petitioner requires application of the principle of *ejusdem generis* in this case. Rather, *Gooch* suggests that apparently comprehensive terms normally will be read as inclusive, while *Impac* stresses the importance of looking to the overall statutory scheme as a guide to the meaning of a term. Thus, both cases support the government's reading of Section 8116(c) rather than that of petitioner.

ejusdem generis in a manner that would result in allowing such claims.[11]

2. *Petitioner's Claim Arises "Because of" the Injury or Death of a Federal Employee*

Section 8116(c) bars liability of the United States with respect to persons otherwise entitled to recover damages "because of the injury or death" of a federal employee. The court of appeals correctly found that petitioner's claim arose "because of" the fatal injury to Bottorff. The court noted that petitioner had alleged two basic duties sounding in tort—a duty to use the aircraft in the manner contemplated by petitioner and the government and a duty to provide adequate maintenance of the aircraft. The court concluded that these two alleged duties were "clearly derivative," since they were based on the duties owed by the United States to its employees and passengers (Pet. App. 6a-7a).[12] The court found that cases cited by petitioner in support of its contention that the al-

[11] In its petition for certiorari petitioner argued that its claim was not excluded by the terms of Section 8116(c) because the claim is "indirect" rather than "direct" (Pet. 11-12 & n.15). Petitioner does not repeat this argument in its brief. It is not even clear that the adjective "direct" is meant to apply to each of the actions enumerated in Section 8116(c), including proceedings under a federal tort liability statute. Indeed, petitioner could have brought its claim against the United States in a separate "direct" action, rather than through an "indirect" third-party action. Congress could not have meant to create a distinction that would allow third parties to escape the limitation of the government's liability by the technicality suggested by petitioner.

[12] The court concluded that a third duty alleged by petitioner—the duty to provide petitioner with information about incidents involving safety of the aircraft—sounded in contract rather than tort, but noted that petitioner had dropped its contractual indemnity claim at the district court stage (Pet. App. 6a-7a).

leged duties were "independent," running from the government to petitioner, did not in fact support this proposition (*id.* at 7a). The court declined to find any independent duty running from a purchaser to a manufacturer to use a product in such a way as not to bring liability upon the manufacturer (*id.* at 7a-8a). Hence, the court held that petitioner's claim was clearly "on account of," or "because of," Bottorff's death (*id.* at 8a).[13]

Judicial interpretation of the language of statutory compensation schemes other than the FECA supports the court of appeals' reading of the "because of" language. As this Court has observed (*Weyerhaeuser Steamship Co.* v. *United States*, *supra*, 372 U.S. at 602), the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(a), is "nearly identical" to that of the FECA.[14] In a case involving a third-party claim against an employer covered by the LHWCA, the Second Circuit remarked that a claim based on noncontractual tort indemnity "clearly would be 'on account of' the employee's injury." *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714, 720 (2d Cir. 1978) (Friendly,

[13] The court of appeals referred to Professor Larson's discussion of state workers' compensation laws, many of which bar claims "on account of" an employee's injury. See 2A A. Larson, *Workmen's Compensation Law* § 76.44, at 14-405 (1976). The original exclusive liability provision of the FECA used the term "on account of," but the phrase "because of" was substituted at the time the provision was codified in 5 U.S.C. The court of appeals' statement clearly was intended to refer to either formulation.

[14] What is now Section 8116(c) of the FECA was patterned in part on the exclusive liability provision of the LHWCA. See *Federal Employees' Compensation Act Amendments of 1949: Hearings on H.R. 3191 Before a Special Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 1st Sess. 25 (1949) (Testimony of J. Donald Kingsley, Acting Administrator, Federal Security Agency).

J.).[15] As the court noted, the majority of state courts have construed workers' compensation laws in this manner. 579 F.2d at 720, citing 2A A. Larson, *Workmen's Compensation Law* § 76.44, at 14-394 (1976). The court pointed out that in an indemnity action by a "passive" tortfeasor against an "active" tortfeasor, based on a theory of quasi-contract, "the origin of the action is in the injury itself and the circumstances surrounding it, and the liabilities that it creates and the indemnity obligation itself spring exclusively from the comparison of the relationship of the two parties to that injury." 579 F.2d at 720 n.1, quoting 2A A. Larson, *Workmen's Compensation Law*, *supra*, § 76.10, at 14-293.

The court of appeals was clearly correct in concluding that petitioner's claim arose "because of" Bottorff's death. Petitioner reached a settlement with Bottorff's representative in order to satisfy a claim for damages for Bottorff's injuries and death. Petitioner's third-party claim against the United States is for indemnity covering those very damages. But for Bottorff's representative's suit against petitioner, petitioner would not have had any claim against the United States. Petitioner's theory underlying its third-party claim is that the government was actively negligent in causing Bottorff's death, while petitioner was only secondarily liable for the death

[15] But cf. *Pippen* v. *Shell Oil Co.*, 661 F.2d 378, 387 n.14 (5th Cir. 1981), citing *Holden* v. *Placid Oil Co.*, 473 F. Supp. 1097, 1100-1101 (E.D. La. 1979). In *Holden* the court stated that tort indemnity that rests on the theory of passive-active or secondary-primary negligence would clearly be "on account of" an employee's injury, but that indemnity based on a duty sounding in tort that exists directly between the indemnitor and the indemnitee would not be "on account of" the injury. *Ibid.* The court in *Holden* was considering a third-party claim by a user against a manufacturer, rather than the reverse situation under consideration in this case.

(see Pet. i). It seems inescapable that petitioner's claim is logically described as arising "because of" Bottorff's death.[16]

Petitioner nonetheless contends that *Weyerhaeuser Steamship Co.* v. *United States*, *supra*, compels the conclusion that Section 8116(c) does not bar its third-party claim. We question whether *Weyerhaeuser* was correctly decided in view of Congress's concern with limiting the overall liability of the government for employment-related injuries and deaths. See pages 33-42, *infra*, and page 24 note 18, *infra*. In any event, petitioner's expansive reading of *Weyerhaeuser* cannot be reconciled with the limited holding of that case. The *Weyerhaeuser* case arose out of a collision between a ship owned by Weyerhaeuser and a dredge owned by the United States Army. A federal civilian employee who had been on board the dredge sued Weyerhaeuser and obtained a settlement payment for injuries he had sustained in the collision. Weyerhaeuser brought an admiralty action against the government under the Public Vessels Act, claiming various items of property damage and also the amount of the settlement payment made to the federal employee. The district court found mutual fault and applied the traditional admiralty rule of divided damages for mutual

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[16] Moreover, Section 8116(c) provides that it is the government's liability "with respect to" the injury or death of a federal employee that is exclusive. Because petitioner's claim could not have arisen in the absence of Bottorff's death, and because the indemnity sought is measured in terms of damages paid to Bottorff's estate for her injuries and death, petitioner's claim against the government plainly is "with respect to" Bottorff's death. Thus, even if petitioner were correct in contending that its claim did not arise "because of" Bottorff's death, it could not show that the claim is not "with respect to" Bottorff's death.

fault collision cases to all items of damages, including the settlement payment. The question before this Court was whether the settlement payment should have been included in the total damages figure that was divided between the two parties. The Court held that inclusion of the settlement payment was proper, finding that the exclusive liability provision of the FECA did not qualify the long-standing admiralty rule of divided damages in mutual fault collisions. 372 U.S. at 600.

In the course of reaching its decision the Court examined the exclusive liability provision of the FECA and found that neither the words of the provision nor the legislative history underlying it provided an answer to the question at hand. The Court found no evidence in the legislative history that Congress had been concerned with the rights of unrelated third parties, much less evidence of "any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." 372 U.S. at 601. However, the Court did not stop there, but proceeded to analyze the divided damages rule. The Court examined its holding in an earlier admiralty case, *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124 (1956), which involved the exclusive liability provision of the LHWCA. In *Ryan*, the Court had held that the LHWCA exclusive liability provision did not bar a shipowner from obtaining reimbursement from a longshoreman's employer for damages recovered by the longshoreman, who was injured by the employer's negligence. The Court in *Weyerhaeuser* observed that its decision in *Ryan* had been "based upon the existence of a contractual relationship between the shipowner and the employer" and that the same result had been reached in subsequent cases, although the contractual relationship had

been considerably more attenuated. 372 U.S. at 602-603.[17]

The Court acknowledged in *Weyerhaeuser* that there was no contractual relationship between the United States and Weyerhaeuser "governing their correlative rights and duties." However, the Court found it significant that for more than a century the admiralty rule of divided damages had "governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault." 372 U.S. at 603. The Court noted also that on an earlier occasion (*The Chattahoochee*, 173 U.S. 540 (1899)) it had held that the divided damages rule would prevail over the Harter Act, a statutory limitation on the liability of one shipowner with respect to an element of damages incurred by the other in a mutual fault collision. The Court characterized its holding in *Weyerhaeuser* as consistent with its earlier decision in *The Chattahoochee*. 372 U.S. at 604.

This summary of the Court's rationale explains why *Weyerhaeuser*, even if a correct interpretation of the FECA, does not govern the present case. *Weyerhaeuser* arose in the unique setting of admiralty law and involved what appeared to the Court at that time to be a venerable and well-established rule for apportionment of liability in mutual fault collision cases.[18] In the Court's view, the case in-

[17] The result in *Ryan* has been specifically overruled by Congress. The 1972 amendments to the LHWCA abolished the vessel's right of indemnity against the stevedore. 33 U.S.C. 905(b). See *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974).

[18] But see *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), in which the Court abandoned the rule of equally divided damages that was applied in *Weyerhaeuser* and replaced it with a rule of proportionate division according to

volved breach of a duty owed by the government directly to Weyerhaeuser—the duty to navigate safely so as not to collide with Weyerhaeuser's vessel. Although the Court mentioned the absence of any specific reference to third parties in the FECA or its legislative history, its principal inquiry appears to have been whether Congress meant to do away with the long-established admiralty rule of divided damages in mutual fault collision cases. At least in the absence of any compelling suggestion to the contrary, the Court concluded that Congress had not meant to alter settled law by doing so.

The cases cited by the Court in support of its holding in *Weyerhaeuser* also involved well-established admiralty concepts that had predated the exclusive liability provision of the FECA. In *Ryan* the Court had considered the contractual obligation of a stevedoring contractor to a shipowner to stow cargo in a reasonably safe manner. The Court had emphasized that the action of the shipowner against the stevedore/employer was "not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee[,]" but instead was grounded on a "purely consensual obligation *owing to the shipowner*" (350 U.S. at 131-132). The Court explained that the "obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract." *Id.* at 133. The holdings of the three maritime cases described by the Court as involving more attenuated contractual relationships than that in *Ryan* did in fact rest on findings that a contractual relationship existed and was intended to

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fault. In light of the Court's decision in *Reliable Transfer*, it is unclear whether the result in *Weyerhaeuser* would be the same if it were decided today.

benefit the third-party plaintiff. See *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); *Crumady* v. *The J.H. Fisser*, 358 U.S. 423, 428-429 (1959); *Waterman Steamship Corp.* v. *Dugan & McNamara Inc.*, 364 U.S. 421, 424-425 (1960). The last case cited by the Court, *The Chattahoochee*, involved the same rule of divided damages in a mutual fault collision that was at issue in *Weyerhaeuser*.

Petitioner urges the Court to read *Weyerhaeuser* as authority for the broad proposition that the FECA does not bar any third-party indemnity claim against the United States. But that simply is not what the Court held. Rather, *Weyerhaeuser* addressed only the divided damages rule in mutual fault collision cases. The Court believed that both *Weyerhaeuser* and *Ryan* (unlike most cases involving joint tortfeasors) involved duties owed by the third-party defendant directly to the third-party plaintiff—in the first case, the duty to navigate safely, and, in the second case, the duty of due care arising from the contract to perform stevedoring services. The Court did not even suggest that its reasoning would extend to a case that did not involve the well-established body of "correlative rights and duties" running between two parties inherent in the divided damages rule or in a contractual relationship. 372 U.S. at 603.[19]

The narrowness of the *Weyerhaeuser* holding is confirmed by this Court's decisions in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R.R.* v. *Erie Lackawanna R.R.*,

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[19] Likewise, the Court in *Ryan* concluded only that a claim based on a contractual undertaking between an employee and a third party could not be considered to arise "on account of" an employee's injury. The Court did not reach the issue of the exclusionary effect of the LHWCA on a non-contractual right of indemnity. 350 U.S. at 132-133 & n.6.

406 U.S. 340 (1972). Both cases involved the exclusive liability provision of the LHWCA, which had been at issue in *Ryan*. In *Halcyon Lines* and *Atlantic Coast Line* the Court held that the exclusive liability feature barred third-party contribution claims against employers covered by the LHWCA.[20] In *Halcyon Lines* the Court expressly declined to extend the holding of the *Ryan* case to non-collision maritime cases. 342 U.S. at 284-285. More than a decade after *Weyerhaeuser* was decided, the Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 112-114 (1974), reaffirmed the correctness of the holdings in *Halcyon Lines* and *Atlantic Coast Line*. That reaffirmation directly contradicts petitioner's reading of *Weyerhaeuser*.

Finally, and perhaps most significant, if petitioner's view of *Weyerhaeuser* were correct, it is difficult to explain why the courts of appeals (with but one exception) have repeatedly construed the FECA to prohibit third-party claims such as the one advanced here. These courts have declined to extend *Weyerhaeuser* beyond maritime collision cases involving the divided damages rule. See, *e.g.*, *Kudelka* v. *American Hoist & Derrick Co.*, 541 F.2d 651, 659 (7th Cir. 1976); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 954-956 (2d Cir. 1975); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 886-887 (3d Cir. 1974); *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 344-345 (1st Cir. 1969); *Murray* v. *United States*, 405 F.2d 1361, 1364-1365 (D.C. Cir. 1968); *United*

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[20] Petitioner's claim here is for indemnity, not contribution. However, as the Second Circuit has noted, "indemnity is only an extreme form of contribution," at least when it is based on the difference between "active" and "passive" negligence of the tortfeasors. See *Slattery* v. *Marra Brothers*, 186 F.2d 134, 138 (2d Cir.) (L. Hand, J.), cert. denied, 341 U.S. 915 (1951).

Air Lines, Inc. v. *Wiener*, 335 F.2d 379, 402-404 (9th Cir.), cert. dismissed, 379 U.S. 951 (1954).[21] Only the Fourth Circuit, in a case involving a third-party claim by a shipowner against the United States, has characterized *Weyerhaeuser* and *Ryan* as generally permitting third-party claims. In *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970), the court concluded that a shipowner's third-party indemnity claim for damages paid to a Department of Agriculture inspector who had been

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[21] A number of the courts of appeals have found that because Section 8116(c) removes the tort liability of the government to the injured employee, it also operates to eliminate the common liability that is the requisite for a contribution or indemnity claim. These courts have correctly concluded that the resulting absence of common liability to the federal employee prevents any third-party claim against the government for damages paid to the employee. See, *e.g.*, *Travelers Insurance Co.* v. *United States*, *supra*; *Newport Air Park, Inc.* v. *United States*, *supra*; *Murray* v. *United States*, *supra*; *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967); *United Air Lines, Inc.* v. *Wiener*, *supra*. But see *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970) (concluding that common liability is unnecessary to support an indemnity claim).

Petitioner argues (Pet. Br. 39-40) that these decisions are inapposite because they rest on a finding of an absence of common liability, rather than on direct interpretation of Section 8116(c). Contrary to petitioner's contention, the decisions rest on a basic consideration similar to that underlying the court of appeals' decision in the present case. That consideration is that *all* liability of the government "because of" a federal employee's death or injury is extinguished except for its obligation to pay compensation under the FECA. Therefore, the government cannot be subjected to additional liability under any theory, including that of joint liability.

injured on board the ship could proceed under any of several different tort and contract theories.[22]

Petitioner suggests (Pet. Br. 19-23, 42) that there should be an exception to the limited liability principle of Section 8116(c) in a broad category of cases in which the United States owes some "independent duty" to a third party. Petitioner does not describe the precise scope of this proposed exception, and it is unclear whether it is to be defined according to federal or state law. Petitioner appears to argue that the holdings in *Weyerhaeuser* and *Ryan* should be extended to a broad category of non-maritime tort

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[22] *Bremen* involved claims under both the Federal Tort Claims Act and the Suits in Admiralty Act. 409 F.2d at 995. The Fourth Circuit has not applied its *Bremen* holding in recent years. However, one judge on the Fourth Circuit has strongly criticized *Bremen* and has advocated en banc reconsideration of the rule established in that case. In *Glover* v. *Johns-Manville Corp.*, 662 F.2d 225 (4th Cir. 1981), the court simply assumed that the FECA would not bar a noncontractual indemnity claim, which it found to be insufficient on other grounds. *Id.* at 228. Judge Hall, in a concurring opinion, stated that he was troubled by the fact that a tortfeasor was permitted to seek indemnity from the government despite the exclusive liability clause of the FECA. In Judge Hall's view, *Bremen* had "misinterpreted the authorities upon which it relied, and * * * failed to recognize the importance of exclusivity provisions" such as that contained in the FECA. *Id.* at 233.

Petitioner, by citing (Pet. Br. 41) *Sandoval* v. *Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163 (5th Cir. 1972), a maritime case, seems to suggest that the Fifth Circuit has joined the Fourth Circuit in its minority view. However, *Sandoval* simply follows this Court's holding in *Ryan* that a shipowner's indemnity claim in an admiralty suit could be sustained on an implied warranty theory. The court in *Sandoval* also stated in dictum that the shipowner could recover from the federally chartered third-party defendant on a tort indemnity basis. The court did not cite the Fourth Circuit's *Bremen* decision in support of its conclusion that the FECA did not bar the claim before it. 460 F.2d at 1169.

claims in which it is alleged that an "active" tortfeasor owed a duty of care to avoid imposing liability on a "passive" tortfeasor.

No court has imposed liability on the United States on the basis of any broad "independent duty" exception of the type described by petitioner.[23] The

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[23] As petitioner acknowledges (Pet. Br. 20-21 n.15), its independent duty theory rests on the principle of an "implied-in-law" contract or "quasi-contract" that may be implied between an "active" tortfeasor and a "passive", or secondary, tortfeasor. It is not at all clear that the United States has waived sovereign immunity with respect to such claims. Under the Federal Tort Claims Act the United States has waived sovereign immunity only with respect to certain tort claims. 28 U.S.C. 2674. Jurisdiction under the Tucker Act (28 U.S.C. 1346(a), 1491) extends only to express contracts and implied-in-fact contracts, not to implied-in-law contracts. *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 10 n.10; *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980).

A few courts of appeals have used the terms "independent duty" or "independent relationship" to describe a possible exception to the general principle that third-party claims are barred by the FECA. In each case the courts stressed that some sort of independent relationship between the government and the third party would be necessary for such an exception to apply. See, *e.g.*, *Travelers Insurance Co.* v. *United States*, *supra*, 493 F.2d at 886 (most courts have found that the FECA precludes a third-party action unless there exists a relationship between the third party and the government independent of the tortious event); *Murray* v. *United States*, *supra*, 405 F.2d at 1367 (need for legal relationship arising out of facts and circumstances other than linkage with same victim). Cf. *Slattery* v. *Marra Brothers*, *supra*, 186 F.2d at 138 (right to indemnity in context of New Jersey Workmen's Compensation Act requires some legal transaction between third party and employer other than that of joint tortfeasors, such as contract). However, no court has actually found that the facts before it justified application of an independent duty exception to the limited liability feature of the FECA. See, *e.g.*, *Murray* v. *United States*, *supra*, 405 F.2d at 1367-1368

Court's holding in *Weyerhaeuser* was limited to the divided damages rule that governed the respective duties of two shipowners, and the Court's holding in *Ryan* concerned a contractual relationship involving services provided by an employer to a third party. In each of these cases the Court concluded that Congress had not meant to eliminate liability arising from these relationships when it enacted an exclusive liability provision. Thus, to the extent the Court has recognized that cases involving independent duties will not be barred by an exclusive liability provision, it has confined that principle to cases concerning a longstanding rule involving what the Court perceived as duties between two shipowners or duties arising out of a contractual obligation to provide services to a third party. The Court has never suggested that the result reached in *Weyerhaeuser* and *Ryan* would apply to any case involving a noncontractual indemnity claim that could be framed in terms of some obligation running from an actively negligent employer to a passively negligent third party.[24]

(concluding that the third-party plaintiff had not actually tendered any claim for non-contractual indemnity). In at least some cases it appears that the courts referred to nothing more than the narrow situations covered by *Weyerhaeuser* and *Ryan*. See, *e.g.*, *Travelers Insurance Co.* v. *United States*, *supra*, 493 F.2d at 886 (specifically referring to *Weyerhaeuser* and *Ryan* as examples of the existence of a relationship independent of the tortious event); *Slattery* v. *Marra Brothers*, *supra*, 186 F.2d at 138-139 (finding no independent relationship between "active" and "passive" tortfeasors).

[24] *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), cited by petitioner in support of its broad independent duty theory (Pet. Br. 22), does not establish any exception to the exclusive liability feature of the FECA. *Burnside* involved not a third-party claim against an employer, but the reverse situation—an employer's claim

The sort of broad independent duty exception urged by petitioner would be contrary to both the language and purpose of the FECA. As Judge Friendly recognized in *Zapico* v. *Bucyrus-Erie*, *supra*, a claim such as petitioner's, based on an implied obligation running between an alleged "active" tortfeasor and an alleged "passive" tortfeasor, differs from the claim in *Ryan*, since it "clearly would be 'on account of' the employee's injury" under the terms of the exclusive liability provision of the LHWCA. 579 F.2d at 720. Likewise, creation of the broad independent duty exception urged by petitioner would contravene the terms of the FECA, which prohibits claims "because of" the employee's injury.[25] Moreover, under petitioner's broad formulation a great many tort indemnity claims could be framed in terms of a duty running from the indemnitor to the indemnitee. Thus, in practice, a broadly defined independent duty exception would seriously undermine

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against a third party. The Court held that the employer was not limited to the subrogation remedy under the LHWCA, but could pursue a separate tort action against a shipowner, based on the shipowner's duty of due care to the stevedore/employer, to recover the amount of compensation payments caused by the shipowner's negligence. 394 U.S. at 414-418. As the Court itself recognized, the holding in *Burnside* is unrelated to the exclusive liability feature of the LHWCA (*id.* at 421-422 n.26).

[25] Most states have rejected any exception to the exclusive liability feature of workers' compensation statutes for noncontractual indemnity claims of the sort advanced by petitioner. See 2A A. Larson, *Workmen's Compensation Law*, *supra*, § 76.44, at 14-394 to 14-399 n.81, 81.1. At a minimum, it is clear that the federal government should not be held subject to third-party claims in those states in which an exclusive liability provision of a state workers' compensation statute would bar a similar claim against a private employer.

the congressionally mandated limited liability principle of the FECA.[26]

B. The Legislative Intent Underlying Section 8116(c) of the FECA Confirms That That Section Operates To Bar Third-Party Claims for Damages Paid To Federal Employees In Connection With Work-Related Injuries or Deaths

The conclusion that the language of Section 8116(c) operates to bar third-party claims such as petitioner's is confirmed by the evidence of congressional intent underlying that section. The FECA has a dual purpose—first, to provide a speedy and efficient remedy for federal employees, regardless of fault, and second, to limit the overall monetary liability of the government for employment-related injuries and deaths. Both the legislative history and the overall scheme of the FECA strongly suggest that Congress did not intend to create the sort of exception to the exclusive liability principle that is urged by petitioner in this case.

Petitioner points to nothing in the legislative history that affirmatively authorizes third-party claims against the United States for damages arising out of injuries to federal employees. Rather, petitioner argues (Pet. Br. 23-31) that the repeated references in the 1949 legislative history to suits by employees or their beneficiaries and the absence of any discussion of suits by third parties must mean that Congress did not intend to bar third-party claims. But waivers of sovereign immunity must be grounded on

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[26] In any event, as discussed below in Section II, the court of appeals correctly concluded that petitioner failed to show any independent duty running between the government and petitioner. Thus, even if this Court were to recognize an exception to the exclusive liability principle of Section 8116(c) in the case of breach of any independent duty, petitioner would not prevail in this case.

stronger evidence than the fact that the dog did not bark in the night. See A.C. Doyle, "Silver Blaze", in *The Complete Sherlock Holmes* 347, 349 (Doubleday).[27]

In any event, there is a simple explanation why Congress in 1949 naturally focused on suits by employees and their beneficiaries, rather than on third parties, in considering amendments to the FECA. The legislative history indicates that it was the large number of suits filed by employees and their beneficiaries that had alerted Congress to the need for new legislation. See, *e.g.*, H.R. Rep. No. 729, 81st Cong., 1st Sess. 14 (1949). Because federal employees themselves were suing the government, despite the FECA remedy, third-party claims presumably appeared to be of secondary significance. It is not even clear from the legislative history whether federal employees had included third parties as defendants in their suits against the government or

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[27] Contrary to petitioner's suggestion, not all statements in the 1949 legislative history refer only to suits by employees or their beneficiaries. See, *e.g.*, S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949); H.R. Rep. No. 729, 81st Cong., 1st Sess. 14 (1949).

Petitioner quotes (Pet. Br. 24) the initial version of H.R. 3191, the bill eventually enacted as the exclusive liability provision in the 1949 amendments. The language of the bill does not indicate that Congress intended to permit third-party actions that would frustrate the limited liability principle established by the provision. See H.R. 3191, 81st Cong., 1st Sess. § 201, *reprinted in Federal Employees' Compensation Act Amendments of 1949: Hearings on H.R. 3191 Before a Special Subcomm. of the House Comm. on Education and Labor, supra*, at 7. Moreover, it is significant that the original reference to "exclusive remedy" eventually was removed and replaced by the reference to the exclusive "liability of the United States." The change shifted the focus from the rights of claimants to limitation of the overall financial exposure of the United States.

whether any employee had sued a third party without also suing the government.[28] Therefore, Congress's failure expressly to mention third-party claims as a problem to which the exclusive liability provision was addressed says very little about how Congress would have regarded third-party claims in a world in which employees themselves were not permitted to sue the government.[29]

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[28] Petitioner argues (Pet. Br. 28-29) that Congress's failure to refer to third-party claims must be significant because third-party actions for indemnity and contribution against the United States were well-established by 1949. None of the maritime cases cited by petitioner involved a third-party claim for damages paid in connection with injuries or death of a federal employee covered by a statutory compensation scheme. Even more significant, by 1949 five federal courts had held that the Federal Tort Claims Act did not authorize joinder of the United States in a suit with other defendants. See *Prechtl* v. *United States*, 84 F. Supp. 889 (W.D.N.Y. 1949); *Sappington* v. *Prencipe*, 87 F. Supp. 357 (D.D.C. 1948), aff'd and rev'd in part, 182 F.2d 102 (D.C. Cir. 1950); *Donovan* v. *McKenna*, 80 F. Supp. 690 (D. Mass. 1948); *Uarte* v. *United States*, 7 F.R.D. 705 (S.D. Cal. 1948); *Drummond* v. *United States*, 78 F. Supp. 730 (E.D. Va. 1948). Other courts had taken the contrary view. See Note, *Joinder of the Government Under the Federal Tort Claims Act*, 59 Yale L.J. 1515, 1516 (1950) ("whether the FTCA permits joinder of the Government * * * remains undetermined"). The Court granted certiorari in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), in order to resolve the conflict between the Third Circuit and the District of Columbia Circuit concerning whether the United States could be impleaded as a third-party defendant under the FTCA. *Id.* at 545-546.

[29] Petitioner asserts (Pet. Br. 30 n.24) that by 1949 most courts had concluded that the exclusive liability provision of the LHWCA did not bar contribution or indemnity claims against a longshoreman's employer by a third party liable in tort for the longshoreman's injuries. However, in the only court of appeals opinion cited by petitioner, the Second Circuit had initially held that a claim for contribution was barred by the exclusive liability provision. *Porello* v. *United States*, 153

Moreover, the legislative history unequivocally reflects that one of Congress's primary concerns in enacting the exclusive liability provision was to limit the overall costs to the government as a result of employee injuries. The Senate report stressed that the exclusive liability provision would result in "savings to the United States, both in damages recovered and in the expense of handling the lawsuits." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). The threat of heavy potential tort liability had caused "considerable concern" among government agencies and instrumentalities. *Ibid.* Passage of the exclusive liability provision was perceived as removing this financial pressure:

> The saving to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits.

F.2d 605, 607 (2d Cir. 1946), aff'd in part, rev'd in part, 330 U.S. 446 (1947). On rehearing, the court left the matter open since it appeared to be unnecessary to resolution of the case, but indicated that it was doubtful whether the authority presented to it would overcome its earlier conclusion. 153 F.2d at 609. At least one district court also had held by 1949 that a claim for contribution was barred by the exclusive liability provision of the LHWCA. See *Johnson* v. *United States*, 79 F. Supp. 448, 449 (D. Ore. 1948) (noting that allowing impleader of the employer would be "like opening a hole in a dike," since it would destroy the basic principle of compensation). Thus, the record in the federal courts would not have persuaded Congress that a uniform rule existed in 1949. Three years later, in *Halcyon Lines* v. *Haenn Ship Corp.*, *supra*, this Court held that claims for contribution from an employer covered by the LHWCA were barred.

S. Rep. No. 836, *supra*, at 30. Congress's desire to limit the financial exposure of the government is similar to the concern underlying other statutory compensation schemes. As Justice Brandeis wrote for the Court in *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 159 (1932), the purpose of workers' compensation laws is to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate."

Congress's efforts to limit the government's liability would be effectively nullified if third parties could recover from the government for damages paid in connection with injuries or death of a federal employee.[30] Such third-party actions would subject the government to the same potential damages liability and litigation expense that the exclusive liability provision was designed to avoid. As one court has pointed out:

> A third-party action cannot be used as a vehicle to circumvent the statutory intent of limiting the Government's liability to the amount scheduled under FECA. If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defendant. Thus, the United States would be forced to pay an amount in excess of its statutory obligation to the

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[30] Cf. *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1115 (5th Cir. 1981), in which the court observed that the judicially-created *Ryan* rule that had permitted third-party contractual indemnity claims against an employer covered by the LHWCA had "effectively nullified" the exclusive liability provision of that Act. Cf. also H. Friendly, *Federal Jurisdiction: A General View* 131-132 (1973) (noting that under the *Ryan* rule the ship had become merely a conduit for enabling the longshoreman to recover from his employer, thereby frustrating the intent of the LHWCA).

> injured employee, albeit indirectly through a third-party plaintiff.

Sheridan v. *DiGiorgio*, 372 F. Supp. 1373, 1376 (E.D. N.Y.), aff'd without opinion, 505 F.2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). As the court recognized in *Sheridan*, it would be far-fetched to assume that Congress intended the extent of the government's liability to depend on whether an additional tortfeasor could be identified. But under petitioner's view, that would be the result: if the government were solely liable, it would pay only compensation benefits, but if it were only partially liable, with another tortfeasor, it would pay not only compensation benefits (subject to a limited right of recoupment under 5 U.S.C. 8132), but also all or part of a tort judgment entered against the other tortfeasor.[31] Congress could not have contemplated such a peculiar result.

This Court has recognized that third-party claims operate to undermine the limited liability feature of statutory compensation schemes and that they must therefore be barred. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, *supra*, the Court explained its reasons for rejecting third-party contribution claims filed against employers covered by the LHWCA. Describing its holding in *Halcyon Lines* v. *Haenn Ship Corp.*, *supra*, the Court noted that it had taken "cognizance of the apparent trade-off in the Act be-

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[31] As petitioner notes (Pet. Br. 20 n.15), tort indemnity, unlike contribution, involves shifting *all* of the damages to the "active" tortfeasor. Because of agreements entered into by petitioner and the government (see pages 4-5 note 4, *supra*), the result of a victory for petitioner in this Court would be that the government would pay only a percentage of the settlement amount paid by petitioner to Bottorff. However, in cases in which no such agreement exists, a third party that prevailed on a tort indemnity claim would succeed in shifting to the government all damages paid to the employee.

tween the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk." 417 U.S. at 112. The Court went on to observe that it had denied contribution in the circumstances of that case when "[c]onfronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers." *Ibid.* The Court described its more recent opinion in *Atlantic Coast Line R.R.* v. *Erie Lackawanna R.R., supra,* in which it had followed *Halcyon Lines* in finding that a claim for contribution from an employer was barred by the exclusive liability provision of the LHWCA, by explaining that since the injured employee in *Atlantic Coast Line* had been entitled to claim compensation under the LHWCA, the employer "was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions." 417 U.S. at 115.

The considerations articulated by the Court with respect to the LHWCA apply with at least equal force to the FECA.[32] Congress struck the same sort of balance in the FECA as in the LHWCA. The government, like an employer covered by the LHWCA, is faced with no-fault liability for employment-related injuries and deaths. Because substantial tort

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[32] This Court has noted the similarity of the exclusive liability provisions of the LHWCA and the FECA. See *Weyerhaeuser Steamship Co.* v. *United States, supra,* 372 U.S. at 602. The Second Circuit in *Galimi* v. *Jetco, Inc., supra,* concluded that the Court's analysis in *Cooper Stevedoring* embodied the "judgment that exclusive remedy provisions such as that in the original Longshoremen's and Harbor Workers' Act and the one [in the FECA] shield an employer from a third-party suit for contribution." 514 F.2d at 956.

judgments resulting from injury or death of federal employees constitute a threat to the public fisc, cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 788-789 & n.4 (1981), the limited liability feature of the FECA is of even greater significance than the comparable provision of the LHWCA. Thus, the government surely is entitled to at least the same "protective mantle" of limited liability as employers covered by the LHWCA.

Indeed, this Court has found that, to achieve Congress's purpose, third-party actions against the United States must be barred even in the case of a statutory compensation scheme without an exclusive liability provision. In *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), the Court considered whether the United States was liable under the FTCA to indemnify a manufacturer for damages it paid to a National Guardsman injured in the course of his duties. Following the accident the National Guardsman received a pension pursuant to the Veterans' Benefits Act, 38 U.S.C. 321 *et seq.* He also sued the manufacturer of the ejection system that had malfunctioned at the time of his injury. The manufacturer cross-claimed against the government, contending that any malfunction in the ejection system was due to faulty specifications, requirements and components provided by the United States or its contractors.

The Veterans' Benefits Act contains no provision comparable to 5 U.S.C. 8116(c). However, in *Feres* v. *United States*, 340 U.S. 135 (1950), the Court held that an on-duty serviceman who is injured as a result of the negligent or wrongful acts of government officials may not recover damages from the United States under the FTCA. The Court justified its conclusion in *Feres* on the basis of the distinctively federal nature of the relationship between the government and members of the Armed

Forces, the existence of a statutory no-fault compensation scheme (the Veterans' Benefits Act) that served as a substitute for tort liability, and the special nature of the relationship between a soldier and his superior. *Id.* at 141-144. See also *United States* v. *Brown*, 348 U.S. 110, 112 (1954).

The Court in *Stencel Aero* considered the significance of the three factors cited in *Feres* in connection with a third-party indemnity claim against the government for damages paid to the serviceman. The Court's comments concerning the features of a statutory compensation scheme (431 U.S. at 673) are of particular significance to this case:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the 'protective mantle of the Act's limitation-of-liability provisions.' See *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 115 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U.S. at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: 'To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result.' *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

The Court's statements about the limited liability feature of the Veterans' Benefits Act are fully applicable to the FECA scheme. The exclusive liability provision of the FECA provides an "upper limit of liability" for the government with respect to employment-connected injuries or deaths. As in the case of the Veterans' Benefits Act, allowing third-party claims against the government for damages paid to a federal employee covered by the FECA would permit circumvention of the limitation: it would "judicially admit at the back door that which has been legislatively turned away at the front door." These considerations apply a fortiori to the FECA, since the exclusive liability feature of the FECA was expressly included by Congress. Because the exclusive liability provision of the FECA would be effectively nullified if third-party claims against the government were permitted, the Court should reject petitioner's contention that the FECA does not bar such claims.[33]

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[33] Petitioner contends that interpretation of Section 8116(c) to bar its indemnity claim would be inequitable. Such alleged inequity does not justify deviation from Congress's intent. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 270-271 (1979). Moreover, petitioner, a sophisticated government contractor, has long been aware that Section 8116(c) and its predecessors do not explicitly exempt third-party claims and that most courts of appeals have held that third-party claims such as petitioner's are barred. Despite its frequent references to itself as a "stranger" to the FECA compensation scheme, petitioner is no stranger to the areas of government procurement or of potential product liability and presumably could have negotiated (and in fact did negotiate, see page 3, *supra*) some form of contractual indemnity provision. Compare *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 674 & n.8.

Of course, any claim that the exclusive liability feature of the FECA is unfair to third parties is most appropriately addressed to Congress in the first instance. It is Congress that

II. EVEN IF THE COURT RECOGNIZES A BROADLY DEFINED EXCEPTION TO THE EXCLUSIVE LIABILITY PRINCIPLE OF 5 U.S.C. 8116(c) FOR CASES INVOLVING AN "INDEPENDENT DUTY" OWED BY THE GOVERNMENT TO A THIRD PARTY, PETITIONER HAS NOT DEMONSTRATED THAT SUCH AN INDEPENDENT DUTY EXISTS IN THE PRESENT CASE

As we have shown in Section I, both the language of Section 8116(c) and the underlying congressional intent point to the conclusion that third-party claims

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struck the original balance in the FECA scheme, and Congress is therefore in the best position to consider whether it is appropriate to alter that balance. See, *e.g.*, *Halcyon Lines* v. *Haenn Ship Co.*, *supra*, 342 U.S. at 286-287. Congress has not been inactive in this area. In recent years legislation that would provide for indemnification of government contractors in product liability suits filed by government employees has been introduced. See H.R. 1504, 97th Cong., 1st Sess., *reprinted in Government Contractors Product Liability Act: Hearing on H.R. 1504 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); H.R. 5351, 96th Cong., 1st Sess. (1979), *reprinted in Government Contractors Product Liability Act: Hearing on H.R. 5351 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980). See also 42 U.S.C. 2210 (providing for indemnification for liability from nuclear incidents for licensees under the Atomic Energy Act of 1954); 10 U.S.C. 2354 (authorizing use of contractual indemnification provisions to cover unusually hazardous risks in connection with military research and development contracts); 42 U.S.C. (Supp. IV) 2458b (authorizing use of contractual indemnification provisions in connection with use of space vehicles); 50 U.S.C. 1431, as implemented by Exec. Order No. 10789 (1958) (authorizing use of contractual indemnification provisions to cover unusually hazardous or nuclear risks in connection with national defense). However, Congress has not acted to reverse legislatively the majority view that Section 8116(c) bars third-party claims for damages paid to federal employ-

against the United States must be barred. Moreover, no broad exception to this principle exists for tort indemnity claims involving breach of a variety of "independent duties" owed by an "active" tortfeasor to a "passive" tortfeasor, because permitting these claims would be inconsistent with the exclusive liability feature of the FECA. But even if this Court were to recognize such a broadly defined exception to the exclusive liability feature, petitioner has not demonstrated that it falls within that exception.[34]

The court of appeals concluded that it was unnecessary to determine whether an "independent duty" exception to the FECA exists for noncontractual indemnity claims because none of the duties alleged by petitioner could be characterized as "independent" (Pet. App. 6a-8a). The court correctly described the alleged duties to use and maintain the aircraft properly as "clearly derivative," since they were based

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ees, although the FECA has been amended on several occasions during the last decade. See, *e.g.*, Act of Dec. 5, 1980, Pub. L. No. 96-449, Section 421, 94 Stat. 2608; Act of Sept. 7, 1974, Pub. L. No. 93-416, 88 Stat. 1143.

[34] Petitioner contends (Pet. Br. 21 n.17) that "the Government has conceded that, but for the FECA, Lockheed is entitled to tort indemnity based on breach of the asserted duties." This statement is incorrect. The government agreed only that if its legal defenses to petitioner's third-party claim were ultimately found to be insufficient it would not contest liability, but would consent to pay a percentage of the damages paid by petitioner to federal employees or their representatives. See Supplemental Statement of Facts to the Brief for the Appellant, filed under seal on October 16, 1980. The agreements were entered into during the district court proceedings, prior to petitioner's assertion of its "independent duty" theory. The government also joined petitioner in filing a joint statement of material facts as to which there is no genuine issue, dated November 19, 1979 (J.A. 92-104). That joint statement does not include any representations concerning duties owed by the government to petitioner or vice versa.

on duties owed by the government to its employees and passengers (*id.* at 6a-7a). The court observed that the cases cited by petitioner to support its contention that the alleged duties were "independent," running from the government to petitioner, did not in fact support that proposition (*id.* at 7a). The court expressed agreement with those courts that had declined to find any independent duty running from a purchaser to a manufacturer to use a product in such a way as not to bring liability upon the manufacturer (*ibid.*).

The petition for certiorari presented no question concerning the court of appeals' conclusion that the duties alleged by petitioner were not "independent" in nature. In fact, the sole question presented to the Court referred to "secondary" liability of the petitioner and "active" negligence of the government—terms that seem to suggest reliance on a joint duty owed to employees and passengers.[35] The petition does not even make reference to any "independent" nature of the alleged duties, except in the last sentence of a footnote near the very end of the petition (Pet. 16 n.18). Given its silence on this subject and its failure to present the court of appeals' finding that the alleged duties were not independent in nature as a question for review by this Court, petitioner must be held to have waived the opportunity to raise the matter. See *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 428-429 (1964); Sup. Ct. R. 21.1(a).

In any event, it is clear that the court of appeals was correct in its characterization of the alleged duties. During the first five years of this litigation petitioner failed even to allege any independent duty

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[35] Indeed, petitioner's characterization of its claim as an "indirect third-party action" (Pet. 12 n.15) indicates that the claim is derivative in nature, not independent of Bottorff's death.

owed by the government to it. In its third-party complaint petitioner framed its indemnity claim in terms of the government's alleged breach of its primary legal duty "to the plaintiff and his decedent" (¶ 10) and requested that the government be held liable either in whole or in proportion to the parties' "respective degrees of responsibility" (¶ 11) (J.A. 27-28). In both its pre-trial brief and its brief in support of the motion for summary judgment, petitioner endorsed the Fourth Circuit's view of the "true nature of a claim for non-contractual tort indemnity, *i.e.*, the existence of a duty to the injured person," citing *Wallenius Bremen G.m.b.H.* [illegible] v. *United States*, *supra*, 409 F.2d at 997 (C.A. App. 132, 167-168). In those same briefs, which were submitted almost four years after the third-party complaint had been filed, petitioner stated that the duty of the United States was "to provide a safe aircraft *for the persons it offered to carry*" (*ibid.*; emphasis added). Only in its brief on appeal, filed in December 1980, did petitioner begin to contend that the duties it alleged were "independent" of any duty the government owed to Bottorff. But, as the court of appeals recognized, petitioner's attempt to recharacterize these duties cannot disguise the fact that the duties are derivative in nature and that its claim therefore does indeed arise "because of" Bottorff's death.

The scope of the independent duty concept invoked by petitioner is unclear. As noted in Section I, no court has been able to identify a set of facts that actually satisfies some general concept of an independent duty in the context of a claim for damages paid to a federal employee in connection with work-related injuries. Much of the case law involving independent duties has arisen under state law, and the law on this subject appears to vary from state to state. See, *e.g.*, *General Electric Co.* v. *Cuban Ameri-*

can Nickel Co., 396 F.2d 89, 98 (5th Cir. 1968) (under Louisiana law noncontractual tort indemnity has been allowed only in the absence of any "active" negligence on the part of one party); *Roberts* v. *American Chain & Cable Co.*, 259 A.2d 43, 50-51 (Me. 1969) (rejecting principle that an obligation to indemnify running from an "active" tortfeasor to a "passive" tortfeasor will be implied as a matter of law). See also 2A A. Larson, *Workmen's Compensation Law*, *supra*, § 76.44. Thus the scope, and even the existence, of an independent duty exception varies according to the jurisdiction.[36]

The primary case on which petitioner relies in support of its independent duty theory (Pet. Br. 22-23) is *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969). In *Burnside* this Court held that a stevedore/employer that had paid LHWCA benefits to its employee was not limited to a subrogation remedy against the shipowner/tortfeasor, but could maintain a direct tort action against the shipowner based on the well-established duty of due care owed by the shipowner under maritime law. *Id.* at 415-417. The principle of exclusive liability under the LHWCA was not at issue, since it was the employer that sought to recover. Moreover, the duty identified in *Burnside* existed in the special context of maritime law and arose as part of an ongoing service relationship between the shipowner and the stevedore.[37] Thus, the situation in *Burnside* was very

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[36] Petitioner asserts that an independent duty can be implied between an "actively" negligent tortfeasor and a "passively" negligent tortfeasor (Pet. 16-17 n.18). Neither court below made a finding on the basis of the stipulated facts that petitioner was "passively" negligent and the government "actively" negligent.

[37] See also *Sandoval* v. *Mitsui Sempaku K.K. Tokyo*, *supra*, 460 F.2d at 1168, in which the Fifth Circuit identified an

different from petitioner's non-maritime case, in which there is nothing comparable to an ongoing service relationship that might give rise to a duty such as the one identified in *Burnside*.[38]

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independent duty owed directly by an employer to a shipowner to exercise reasonable care to avoid the foreseeable harm of the shipowner's liability to the employee. As in *Burnside*, the duty arose in a maritime context and in connection with an ongoing service relationship between the employer and the shipowner at the time of the accident.

[38] Petitioner cites three other cases in support of its argument that its claim is based on an independent duty and thus does not arise "because of" Bottorff's death (Pet. Br. 23). Two of the cases, *American District Telegraph Co.* v. *Kittleson*, 179 F.2d 946 (8th Cir. 1950), and *Rich* v. *United States*, 177 F.2d 688 (2d Cir. 1949), are distinguishable on the ground that the duties at issue arose from a contractual relationship. See *Slattery* v. *Marra Brothers*, 186 F.2d 134, 138, 139 (2d Cir.) (L. Hand, J.), cert. denied, 341 U.S. 915 (1951). The third case, *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 2d 567, 568 (1938) is distinguishable on the ground that the employer actually had committed an independent tort against the third party, *i.e.*, negligent breaking of a pipeline maintained by the third party. See *Slattery* v. *Marra Brothers*, *supra*, 186 F.2d at 138. In any event, the *Westchester* case represents a minority position among the states. See 2A A. Larson, *Workmen's Compensation Law*, *supra*, § 76.44.

As the court of appeals correctly noted (Pet. App. 7a), there is little support for petitioner's claim that a buyer owes to a seller a duty under tort law to use the item purchased in a manner so as to protect its employees from harm. See, *e.g.*, *White* v. *Johns-Manville Corp.*, 662 F.2d 243, 247-248 (4th Cir. 1981); *Zapico* v. *Bucyrus-Erie Co.*, *supra*, 574 F.2d at 723 (rejecting theory of liability of user to manufacturer for former's negligent use of latter's defective product); *Santisteven* v. *Dow Chemical Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974) (argument that purchaser had independent duty to avoid subjecting manufacturer to risk of tort liability "turns indemnity on its head"); 2A A. Larson, *Workmen's Compen-*

Petitioner attempts to analogize the alleged duties in the present case to the duty of one shipowner to another at issue in *Weyerhaeuser* (Pet. Br. 42). However, the divided damages rule discussed in *Weyerhaeuser* had existed for over a century and, at least at that time, appeared to the Court to delineate clearly the "correlative rights and duties" of the parties involved in a martime collision involving mutual fault. In the Court's view, the duty at issue—presumably the duty of safe navigation, *i.e.*, the duty to avoid colliding with, and causing harm to, another shipowner's vessel—clearly ran from one shipowner to another. Unlike petitioner, Weyerhaeuser would have had a direct claim against the government whether or not any federal employee had been injured. Because of the venerable status and clarity of the divided damages rule the Court concluded that Congress had not intended that its application should be barred by the exclusive liability provision of FECA. In contrast, the duty urged by petitioner in this case is broad and ill-defined. The alleged duty is not an obligation to avoid damaging the property of a third party; rather, it consists primarily of an obligation to take steps to avoid an accident that might result in imposition of liability on a third party that is not directly involved in the accident. At bottom, petitioner's claim rests not on any ongoing relationship between the government and a third party, but on existence of an ob-

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sation Law, supra, § 76.44, at 14-402 ("reverse warranty" theory distorts concept of implied warranty "out of all relation to reality"). But see *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143, 282 N.E. 2d 288, 331 N.Y.S. 2d 382 (1972). In some cases, such a duty is considered to sound in contract rather than tort. See, *e.g.*, *White* v. *Johns-Manville Corp.*, *supra*, 662 F.2d at 247-248.

ligation to avoid injury to a federal employee. Such a claim cannot be characterized as independent of a duty owed directly to the employee.

Thus, assuming that some broadly defined independent duty exception to the general rule barring third-party claims is consistent with the FECA compensation scheme, petitioner has not established the breach of an independent duty in this case. As the court of appeals correctly observed, the duties alleged by petitioner cannot be separated from the duties owed by the government to its employees. However petitioner chooses to characterize those duties, they do not fall within any recognized exception to the limited liability principle of the FECA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 385892 1078

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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* In addition to the affiliates listed in the Petition for Certiorari at page i, and those listed in the Brief for Petitioner at page i, Lockheed has recently affiliated with Lockheed-Arabia Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1181

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The sole issue in this case is whether the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), bars a person who has paid damages to an injured or deceased federal employee from recovering tort indemnity against the United States.[1] As shown in Lockheed's

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[1] In this case Lockheed seeks indemnity from the Government for damages paid to the estate of Ann Nash Bottorff, a public information officer of the United States who died in the airplane crash near Saigon on April 4, 1975. (See Pet. Br. 3-9). Following that crash, Lockheed and the United States entered into an agreement dividing by stipulated percentage any recovery against Lockheed by or on

opening brief, the language and legislative history of § 8116(c), as well as this Court's interpretation of that provision in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), establish that such tort indemnity claims are not precluded.

The Government's brief fails to refute the overwhelming evidence that Congress, in enacting § 8116(c), did not intend to bar third-party claims for tort indemnity. Moreover, the Government is unable to provide a reasoned basis for distinguishing *Weyerhaeuser* from the present case. At bottom, the Government's position is that this Court, in the name of protecting the public fisc, should overrule *Weyerhaeuser* and rewrite § 8116(c) to bar tort indemnity claims. That invitation should be declined.

The Admiralty Claim. As a preliminary matter, we note that the Government introduces a quite unnecessary complexity when it suggests that this Court might care to dismiss the petition because of a reserved claim under the Suits in Admiralty Act (Govt. Br. 6-8).[2] Plainly,

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behalf of persons injured or killed in the crash; the agreement was made without prejudice to whatever immunity from tort indemnity that the Government might have under § 8116(c) with respect to damages paid to civilian employees. In light of that agreement, and because the only defense raised by the Government in its motion to dismiss was that § 8116(c) bars Lockheed's claim, "the result of a victory for petitioner in this Court would be that the government" would reimburse Lockheed the agreed-upon percentage of the damages paid by Lockheed. Govt. Br. 38 n.31.

[2] The Government's "suggestion" derives from the fact that Lockheed's third-party complaint for tort indemnity against the Government sought relief pursuant to both the Federal Tort Claims Act (FTCA) and the Suits in Admiralty Act (SIA). The District Court ruled that jurisdiction existed under the FTCA and the Court of Appeals did not question that ruling. Neither court considered whether Lockheed's claim was also cognizable under the SIA; instead, the Court of Appeals remanded that issue to the District Court. Pursuant to 28 U.S.C. § 2680(d), district courts do not possess subject matter jurisdiction under the FTCA with respect to any claim cognizable under the SIA. Consequently, the Government suggests,

however, the Suits in Admiralty issue is self-vanishing. If, contrary to *Weyerhaeuser*, this Court holds that § 8116(c) bars tort indemnity claims, the bar would apply whether such claims were premised upon the Suits in Admiralty Act or the Federal Tort Claims Act.[3] Conversely, a decision by this Court imposing liability for tort indemnity on the Government under the FTCA would eliminate any occasion for Lockheed to press its Suits in Admiralty Act claim below.[4] In any event, the Government in the end concedes that certiorari should not be dismissed. (Govt. Br. 8).

I. THE LANGUAGE OF THE STATUTE

Section 8116(c) provides in relevant part that:

> "The liability of the United States * * * under this subchapter * * * with respect to the injury or death of an employee is exclusive and instead of all other

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a ruling by this Court as to whether the FECA bars Lockheed's claim for tort indemnity under the FTCA may prove to be "unnecessary," because the District Court on remand may conclude that jurisdiction exists under the SIA, and thus Lockheed "would never have had a claim under the FTCA." Govt. Br. 8.

[3] The legislative history demonstrates that § 8116(c) was intended to bar suits against the Government by federal employees premised on any tort liability statute, including the SIA. See p. 13 & n.16, *infra*.

[4] The District Court ruled that FTCA jurisdiction exists. Neither Lockheed nor the Government has challenged that ruling. The Court should therefore proceed upon the assumption that the FTCA applies and decide the FECA issue presented. See, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 619 & n.2 (1978), passing over a question as to admiralty jurisdiction, and *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 651 (1973), passing over a question of jurisdiction for review of agency action, each because the issue was not raised by the parties. This is especially appropriate here since the District Court's jurisdiction exists under one statute or the other, and the dispositive issue is the same under both. The "jurisdictional" issue here, indeed, does not at all relate to the judicial power of the federal court, but only to whether the case should be numbered in the civil or the admiralty docket.

> liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States * * * because of the injury or death * * *."

The obvious import of this language is to make the statutory obligation of the United States to provide workmen's compensation benefits the exclusive liability of the Government to the employee, or to anyone claiming under or through the employee, because of a work-related injury or death. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 129 (1956); *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 600-01 (1963). As shown in our opening brief (Pet. Br. 16-23), there is no warrant in the statutory text for reading the provision as extinguishing Government liability to a person, such as Lockheed, who is not claiming under or through an employee.[5]

1. The Government asserts that the phrases "all other liability" and "any other person" show an intention comprehensively to exclude all liability to anyone. (Govt. Br. 16). One does not, of course, construe a statute by isolated words, and under the Government's construction the entire "kinship" clause, limiting liability to the specified classes of persons, as well as the "because of" phrase, would be superfluous. Had Congress intended to exclude all Government liability, the statutory text would have contained a simple exclusion and would not have cata-

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[5] It seems worth a footnote, though perhaps not a long one, to show that the Government's brief in the *Ryan* case supports many of Lockheed's arguments here. Brief for the United States, *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, No. 4, October Term 1955. Thus: The Act is modeled on the New York statute and should be similarly interpreted (p. 40). *Ejusdem generis* limits the bar against suit by "anyone" to a class similar to the enumerated persons (pp. 42-43). The bar reflects the *quid pro quo* to the employee, the imposition of Government liability without fault, while there is none offered to the third party (pp. 44-45).

logued specified debarred claimants who sue "because of" the employee's injury or death.[6]

Rather than treating so much of the statutory language as surplusage (as the Government does), Lockheed submits that the enumeration of specific individuals, and the phrase excluding liability only to persons who claim damages "because of" an employee's injury or death, illuminate each other. The statute specifically mentions the employee and his representative and kin because those are the types of people who, absent a bar such as § 8116(c), would typically be entitled to damages under state law upon proof that the Government's negligence led to the injury or death of an employee. In other words, those are the types of people who would be entitled to damages "because of" an employee's injury or death. And it is fair to bar such suits because these claimants are potential recipients of FECA payments. Unlike an employee, or those claiming under him, an indemnitee derives no benefit from the compensation scheme and his entitlement to damages does not arise simply because the Government negligently injured an employee. The would-

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[6] We need not elaborate upon the sometimes variable application of *ejusdem generis* (Compare *Third National Bank* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977) and *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) with *United States* v. *Powell*, 423 U.S. 87, 90-91 (1975)), for this Court has held in *Ryan*, and has indicated in *Weyerhaeuser*, that the prior enumeration of specific individuals in the very limitation-of-liability phrase in question limits the exclusion of liability to the employee and those claiming under or through him. The Government advances *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980), to support its contention that the phrase "any other person" should not be construed in light of the statute's prior enumeration of individuals. Govt. Br. 16-17. In *Harrison* this Court declined to apply the rule of *ejusdem generis* to limit the phrase "any other . . . final action" in § 307(b)(1) of the Clean Air Act to agency actions taken after notice and opportunity for a hearing. The Court's action was premised, *inter alia*, on the ground that at least one of the specifically enumerated administrative actions could be taken without notice and opportunity for hearing, thus making the concluding general phrase unsusceptible to the narrowing construction urged upon the Court.

be indemnitee must show that the Government should be required to respond for the indemnitee's financial liability or loss. This may entail proving an express or implied indemnity contract, or, as in this case, showing that the Government's active negligence caused the accident and led to the imposition of secondary liability on Lockheed as manufacturer of the aircraft. Thus, an indemnitee's claim does not arise "because of [the employee's] injury or death." See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), discussed at Pet. Br. 22-23.

2. The Government argues at length that Lockheed has proposed an amorphous "independent duty" exception to § 8116(c) without having demonstrated that its indemnity claim is based on such a duty. Govt. Br. 29-33, 43-50. This is a semantic attack upon a strawman. Although the Court of Appeals ruled that any third-party claim not based on an "independent duty" is barred by § 8116(c), Lockheed rejects that construction of the statute and does not propose that this Court recognize an "independent duty" exception.[7] Lockheed's position is merely that a tort indemnitee is not "any other person" claiming damages "because of" an employee's injury or death within the meaning of § 8116(c). We suggest that the Court avoid the essentially question-begging phrase "independent duty" and focus on the statutory language.

[7] The Court of Appeals held that since Lockheed's indemnity claim was based on the same governmental misfeasance that caused the accident (improper maintenance and misuse of the aircraft), Lockheed's claim could not be deemed based on an "independent duty" owed Lockheed by the Government, and therefore, its claim arose "because of" the employee's death. (Pet. App. 6a-8a; 665 F.2d at 1333-34). In effect, the Court of Appeals' ruling means that only contractual indemnity claims survive § 8116(c), as its opinion essentially acknowledges. (Pet. App. 8a; 665 F.2d at 1333-34). Rather than arguing that its claim satisfies the Court of Appeals' "independent duty" test, Lockheed urges that the Court of Appeals' construction of § 8116(c) runs counter to the language and legislative history of the provision, as well as this Court's decision in *Weyerhaeuser*.

As the Government points out (Govt. Br. 10, 21), were it not for the employee's death, Lockheed would not now be suing the Government. In this sense, Lockheed's claim is not wholly "independent" of the employee's death. But that is unimportant. The employee's death is similarly a necessary ingredient of suits based on indemnity agreements or on the divided damages rule, but this Court's decisions in *Ryan* and *Weyerhaeuser* establish that such suits are not precluded.

3. The Government argues, too, that waivers of sovereign immunity must be strictly construed and that nothing in § 8116(c) explicitly preserves the right of third parties to recover tort indemnity from the United States. Govt. Br. 9, 14-15. But § 8116(c) is not a waiver of sovereign immunity. It is an exception to a waiver of sovereign immunity contained in an earlier statute, the Federal Tort Claims Act, and the Government does not contest that the FTCA waiver is applicable to tort indemnity claims.[8] Statutory exceptions to the broad waiver of sovereign immunity contained in the FTCA should be strictly construed. The hardships occasioned by sovereign immunity are not to be imported "by refinement of construction where consent has been announced." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 554 (1951). "There is no justification for this Court to read exemp-

[8] See note 1, *supra*. The Government clouds its concession with the statement that "[i]t is not at all clear" whether the FTCA's waiver of sovereign immunity encompasses claims against the United States based upon "implied-in-law" (or "quasi") contracts. Govt. Br. 30 n.23. Regardless of whether the FTCA authorizes suit against the Government for breaches of all types of implied-in-law contracts, it is well-established that the type of quasi-contractual claim at issue here—*i.e.*, a claim for tort indemnity—is encompassed within the FTCA's waiver of sovereign immunity. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 669-70 (1977). The Government seems to have found its tort liability clear enough to agree with Lockheed to share—reserving Government employees—millions of dollars of liability.

tions into the [FTCA] beyond those provided by Congress." *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 320 (1957).[9]

II. THE HISTORY OF THE PROVISION

The Government necessarily agrees that there is not a shred of evidence in the legislative history of § 8116(c) indicating that Congress intended to bar third-party claims against the United States. Govt. Br. 33-35. The Government argues, however, that the course of the legislative history is entitled to little weight because Congress naturally focused on the pressing problem of suits by employees and their beneficiaries and merely overlooked the question of third-party claims. Govt. Br. 34-35. This paradoxical dismissal of the legislative history, on the ground that the Act should be given an extended application because the Congress was thinking only of a narrow application, is quite misguided.

1. The history of § 8116(c) shows that Congress intended only to affect the rights of employees and their beneficiaries (see Pet. Br. 28-29). The statute should accordingly be construed, in the absence of statutory language compelling a contrary result, so as to serve only that limited purpose. *E.g.*, *District of Columbia* v. *Carter*, 409 U.S. 418, 432 (1973) (courts are "not at liberty to recast [a] statute to expand its application beyond the limited reach Congress gave it").

2. While third-party claims were not explicitly discussed by the Congress, there is persuasive evidence that Congress affirmatively intended not to bar such claims. As explained in our opening brief (Pet. Br. 29-30), § 8116(c) was modeled on a provision in the New York Workmen's Compensation Law and by 1949 that provision had been authoritatively construed as not barring

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[9] See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150, 166 (1963); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949).

tort indemnity claims. *E.g., Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938). In selecting the New York law as its model, Congress, it must be presumed, intended § 8116(c) not to bar tort indemnity claims. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-99 (1979) ("it is always appropriate to assume that our elected representatives, like other citizens, know the law"). This conclusion is buttressed by this Court's decisions under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which also was modeled upon the New York law. In *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, 131 (1956), the Court explicitly relied upon the *Westchester* case to support its conclusion that the limitation-of-liability provision of the LHWCA does not bar indemnity claims.[10] Moreover, 25 years later the Court again turned to the New York court's construction of the New York statute to construe a catch-all phrase in the LHWCA. *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 275-76 (1980).[11]

3. In 1972 Congress amended the LHWCA to eliminate the shipowner's right to assert third-party claims against the employer, thus reversing the *Ryan* result. 33 U.S.C. § 905(b). No analogous amendment has been made to the FECA. The obvious inference is that if amendment was necessary to eliminate third-party claims under the

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[10] The Government makes passing reference to the fact that a majority of the state courts construe their workmen's compensation laws as forbidding tort indemnity claims against the employer (Govt. Br. 32, n.25). This is unimportant since the federal statutes were modeled on the New York statute, and the New York courts have consistently allowed such tort indemnity claims. See Pet. Br. 29-30.

[11] "Congress selected the New York statute as the model for the LHWCA because that statute was considered one of the best workmen's compensation laws of its time. See H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926)." 449 U.S. at 275 n.13.

LHWCA, then it is also necessary under the nearly identical words of the FECA.

4. The rationale underlying passage of § 8116(c) was that since guaranteed compensation benefits for work-related injury or death were being substantially increased in the FECA Amendments of 1949, it would be fair to preclude the employee and his dependents from pursuing additional remedies against the Government. H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949); S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). That fairness rationale is simply inapplicable to third-party claimants such as Lockheed who derive no benefit from the workmen's compensation system.

5. To the extent that the recovery against Lockheed in this case reflected a strict product liability, Lockheed's position is not far removed from that of a shipowner who must respond in damages due to negligence-free liability for unseaworthiness. When the Congress in the 1972 amendments to the LHWCA eliminated the shipowner's right to recover over against the stevedore-employer, it also abolished the longshoreman's right to recover from the shipowner on an unseaworthiness theory, limiting the vessel's liability to cases of actual negligence.[12] The Government asks that this Court of its own authority curtail recovery over by non-negligent third parties to whom no compensatory *quid pro quo* of any sort has been offered.

6. The Government also contends that the legislative history of § 8116(c) discloses an intention to limit the

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[12] Thus, the House Committee said that *Ryan* "is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the unseaworthiness doctrine. Since the vessel's liability is to be based on its own negligence * * * there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 7 (1972).

Government's costs and that allowance of third-party claims would "effectively nullify" this intent. Govt. Br. 36-38. This argument overstates Congress' concern with limiting costs. With respect to third-party claims, Congress has by the Federal Tort Claims Act made an authoritative choice between parsimony and fairness. And as *Weyerhaeuser* recognized, nothing in the legislative history of § 8116(c) suggests that Congress intended to curtail the Government's tort liability to those given no benefit by the FECA.[13] What the legislative history does show is a congressional intent to be spared the costs previously incurred in responding to "needless" lawsuits brought by employees and their dependents. See, *e.g.*, S. Rep. No. 836, 81st Cong., 1st Sess. 23, 30 (1949), *quoted in* Govt. Br. at 36. In any case, allowance of tort indemnity claims is not inconsistent with Congress' belief that § 8116(c) would save the Government money. In the vast majority of employee accidents, there are no third parties from whom an employee will recover damages, and thus no possibility of third-party claims. Moreover, even where third parties are involved, the Government cannot be held liable for contribution or tort indemnity under the FTCA unless it has been negligent, *Laird* v. *Nelms*, 406 U.S. 797 (1972), and many accidents compensable under the FECA may occur even though the Government is entirely free from fault.

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[13] The Government states that "it would be far-fetched to assume that Congress intended the extent of the government's liability to depend on whether [a third-party] tortfeasor" exists from whom an injured employee may recover damages. Govt. Br. 38. In fact, such a conclusion is eminently reasonable. Section 8116(c) is premised upon congressional recognition that, as between the Government and its employee, it is fair to limit the Government's liability because the employee has received as a *quid pro quo* swift and assured compensation for work-related injuries and deaths. A third-party tortfeasor, however, derives no benefit from the FECA compensation system, and hence, as between the tortfeasor and the Government, fairness dictates that the Government's liability *not* be limited by the FECA.

III. THE CASE LAW

A. The FECA Cases

1. In *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597 (1963), this Court held that § 7(b) of the FECA (now § 8116(c)) does not bar recovery of contribution from the Government pursuant to the admiralty rule of divided damages in mutual-fault collisions. We see no principled ground for a decision that § 8116(c) does not bar third-party tort recovery from the Government in the case of vessel collisions but does bar such recovery in aircraft accidents. Indeed, the Government at one point does make a sober assessment of the reach of *Weyerhaeuser*, noting that "We question whether *Weyerhaeuser* was correctly decided" (Govt. Br. 22). But more often it claims the decision to be inapplicable. Its many reasons come down to two,[14] neither of which is defensible.

The admiralty rule of divided damages is, the Government urges, not affected by § 8116(c) because it was old and well-established (Govt. Br. 24-25). But so, too, is tort indemnity an old and well-established rule. See, *e.g.*, *Chicago City* v. *Robbins*, 67 U.S. (2 Black) 418 (1863); *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316, 327-28 (1896). More important, the divided damages doctrine, like other judge-made maritime law, was wholly subject to legislative modification.[15] Had Con-

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[14] We state these two "reasons" in an effort to crystallize several truisms regarding the divided damages doctrine which recur at various points in the Government's brief: that it is an admiralty doctrine; that it is very old; that it involves a body of correlative rights and duties between shipowners; that it is based on a direct duty between shipowners; and that a shipowner would have a claim for property damage pursuant to that doctrine even if the collision resulted in no personal injuries. Govt. Br. 23-31, 49-50.

[15] See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952) (declining, in light of federal legislation in the area, to apply prior

gress intended in the 1949 FECA Amendments to preclude third-party tort claims for reimbursement from the Government, the divided damages doctrine would certainly have been altered in respect of injury to a Government employee.[16]

The Government's second ground of distinction is that the right to reimbursement under the divided damages doctrine rests on the "direct" duty a shipowner owes to another shipowner to navigate safely so as not to damage the other's vessel. This misses the point of *Weyerhaeuser*. The shipowner's disputed claim in *Weyerhaeuser* was not for reimbursement with respect to damage to its vessel; the shipowner's claim was for contribution with respect to damages paid an injured federal employee. As to such a claim, the duty of safe navigation owed by the Government as shipowner to the private shipowner is indistinguishable from the duty on which tort indemnity is based—the duty to avoid imposing foreseeable liability on another through one's own negligence. See Pet. Br. 42. In *Weyerhaeuser* this Court held that such a cause of action is not excluded by § 8116(c) and that holding is directly applicable here.

2. The Government adheres to its position that *Weyerhaeuser* is confined to maritime collisions without men-

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maritime law permitting an employer a set-off against wages due a seaman); *cf. United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) (replacing the divided damages doctrine with a proportionate fault rule).

[16] Indeed, the legislative history of § 8116(c) expressly refutes the suggestion that tort claims arising in admiralty stand on a different footing than other tort claims—Congress was just as concerned with employee suits under the Public Vessels Act and the Suits in Admiralty Act as it was with employee suits under the FTCA. *E.g.*, H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949); S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949).

tion of *Treadwell Construction Co.* v. *United States*, 372 U.S. 772 (1963). As explained in our opening brief (Pet. Br. 37-38), the Court immediately after deciding *Weyerhaeuser* granted certiorari in *Treadwell*, a non-maritime case involving injury to a Government employee in which the Third Circuit had held the third party could not recover over against the Government. This Court remanded for consideration in the light of *Weyerhaeuser*. On remand, the District Court imposed third-party liability and the Solicitor General refused authority to appeal. See *Hart* v. *Simon*, 223 F. Supp. 109, 111 (E.D. Pa. 1963). It seems evident that neither this Court nor Solicitor General Cox considered the rule of *Weyerhaeuser* necessarily confined to maritime collisions.

3. The lower court cases applying *Weyerhaeuser* are inconsistent and in some disarray. Using a broad-brush division, the Government contends that Lockheed's claim would be accepted by one and rejected by six circuits. Govt. Br. 13, 27-28 & n.21. This is incorrect. Two circuits have squarely held that tort indemnity claims are not precluded by § 8116(c).[17] Two, besides the court below, have held that such claims are barred.[18] As explained in our opening brief (Pet. Br. 38-40), the other circuits counted by the Government do not hold that § 8116(c) bars tort indemnity claims. Rather, they hold that § 8116(c) extinguishes the substantive liability of the Government to the employee, thereby precluding third-party claims as a matter of state or federal com-

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[17] *Wallenius Bremen, G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); *Sandoval* v. *Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163, 1168-69 (5th Cir. 1972) (holding tort indemnity not barred by the FECA as one of two coordinate grounds of decision).

[18] *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975); *Kudelka* v. *American Hoist & Derrick Co.*, 541 F.2d 651, 658-59 (7th Cir. 1976).

mon law,[19] or find the Government without liability for contribution as a joint tortfeasor while reserving decision as to third-party claims for tort indemnity.[20]

B. The LHWCA Cases

The Government argues that *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), *Atlantic Coast Line Railroad* v. *Erie Lackawanna Railroad*, 406 U.S. 340 (1972), and *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), establish that § 5 of the LHWCA, prior to its amendment in 1972, barred third-party claims for contribution against employers covered by that Act. Govt. Br. 26-27, 38-39. It concludes that the considerations underlying those decisions should lead the Court to construe the FECA as barring third-party tort indemnity claims.

The Government misreads these cases. The single question decided in *Halcyon*, *Atlantic Coast Line*, and *Cooper Stevedoring* was whether, as a matter of substantive maritime law, a right of contribution exists in non-collision maritime cases. *Halcyon* held that no such right exists. The *Halcyon* Court expressly declined to decide whether § 5 precludes "a third party from having any right of contribution against an employer under the Act in cases where the joint negligence of a third party and the employer injure an employee covered by the Act." 342 U.S. at 286-87 n.12. The very brief per curiam opinion in *Atlantic Coast Line* merely applied *Halcyon*'s holding that "there is *no right of contribution* among tort

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[19] *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 398-404 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968); *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969); *Travelers Ins. Co.* v. *United States*, 493 F.2d 881 (3d Cir. 1974).

[20] *Murray, supra*; *Newport Air Park, Inc., supra.*

feasors in a non-collision case." *Benazet* v. *Atlantic Coast Line Railroad*, 442 F.2d 694, 697 (2d Cir. 1971), *aff'd*, 406 U.S. 340 (1972) (emphasis in original).

In *Cooper*, this Court retreated from its broad holdings in *Halcyon* and *Atlantic Coast Line* and ruled that contribution may be obtained in some non-collision maritime cases. Instead of overruling *Halcyon* and *Atlantic Coast Line*, the Court distinguished them as involving claims against employers covered by § 5 of the Harbor Workers' Act, while in *Cooper* the stevedore from whom contribution was sought was not a § 5 employer, 417 U.S. at 112-14. This dictum, however, is not of much relevance here for several reasons: (1) The Court in *Cooper* did not describe *Halcyon* as resting on the ground expressly disavowed in *Halcyon*—that § 5 bars contribution claims against covered employers.[21] Rather, the *Cooper* Court described *Halcyon* as refusing to recognize a substantive right to contribution in non-collision maritime cases because of the possibility that such recognition "might" be inconsistent with § 5. 417 U.S. at 112. In the case at bar the Court has not been asked to create a substantive right to indemnity. (2) The *Cooper* Court took pains to point out that although *Halcyon*'s broad ruling may have been incorrect as a matter of admiralty law, the 1972 Amendments to § 5 expressly barred shipowners' claims

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[21] The question whether § 5 of the LHWCA, prior to its amendment in 1972, precluded third-party claims for contribution or tort indemnity against stevedore-employers has always been left open by this Court. *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 421 & n.25 (1969); *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 132-33 & n.6 (1956); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286-87 n.12 (1952). That the Court never found it necessary to grapple with this question is largely attributable to *Ryan* and its progeny, which ensured that a shipowner could virtually always recover contractual indemnity from a stevedore-employer. See, *e.g.*, *Crumady* v. *The J.H. Fisser*, 358 U.S. 423 (1959); *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960).

for reimbursement from stevedore-employers, thus making *Halcyon* good law on its facts and reversing *Ryan*, which had held indemnity claims not barred by § 5. 417 U.S. at 112-13. No analogous amendment has been made to the FECA. (3) *Cooper*, *Halcyon*, and *Atlantic Coast Line* involved contribution, which this Court has been careful to distinguish from tort indemnity when considering the preclusive effect of limitation-of-liability provisions such as § 5 prior to its amendment in 1972. See *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 421 & n.25 (1969).[22]

C. The Serviceman Cases

The Government relies upon *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), for the proposition that third-party claims undermine statutory compensation systems and that they must therefore be barred. Govt. Br. 40-42. That reliance is misplaced.

The question in *Stencel* was whether the FTCA's waiver of sovereign immunity encompasses a suit by a manufacturer of military equipment seeking tort indemnity for damages paid to a member of the Armed Forces injured in the course of military service. Resolution of that issue turned upon interpretation of the scope of the judicially implied exception to the FTCA of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that an on-duty serviceman injured due to the negligence of government officials may not recover damages from the United States under the FTCA. The *Stencel* Court examined the three considerations underlying the *Feres* doctrine—the inappropriateness of subjecting the relationship between military personnel and the Government to a variety of local substantive laws (made applicable by the FTCA), the existence of a statutory compensation scheme

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[22] Unlike tort indemnity, contribution is typically thought to rest on joint liability. See, *e.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 86-88 (1981).

for injured servicemen, and the serious effect allowance of such suits would have on military discipline—and found that on the whole they were applicable to the manufacturer's indemnity claim and that therefore allowance of such a claim would be inappropriate. While the Court gave some weight to the existence of a statutory compensation scheme, it did not, contrary to the Government's argument, find that factor dispositive but rather deemed it somewhat "difficult to apply" in the indemnity context because an indemnitee derives no benefit from such a scheme. 431 U.S. at 672.

The inquiries undertaken by this Court in *Stencel* and *Feres* are not relevant to the present case. At issue here is the scope of § 8116(c), a matter that must be resolved by reference to the language and legislative history of the FECA. There is no occasion to consider the reach of the FTCA.

In any event, the three factors underlying the *Feres* doctrine are, on the whole, inapplicable here. The first factor—that the relationship between the Government and members of its Armed Forces "is distinctly federal in character," thus making it inappropriate for liability to depend on state law, has been limited to the military context. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) (*Feres* inapplicable to vessel's claim that Coast Guard negligently operated a lighthouse); *United States* v. *Muniz*, 374 U.S. 150, 162 (1963) (*Feres* inapplicable to suit by federal prisoner). The second consideration, the existence of an alternate compensation system, is, as the Court noted in *Stencel*, difficult to apply because a third-party claimant does not benefit from that system. The third factor, the effect maintenance of a suit would have on military discipline, is obviously inapplicable. That factor is at the core of the *Feres* doctrine. See *United States* v. *Muniz*, *supra*; *United States* v. *Brown*, 348 U.S. 110, 112 (1954).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 4, 1982

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Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1181

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici comprise eight mutual insurance associations that protect their members in respect of liabilities which arise in international commerce. Their members are owners and operators of ships of practically all nations. *Amici*, The Britannia Steam Ship Insurance Association Limited, The London Steam-Ship Owners' Mutual Insurance Association Limited, The North of England Protecting and Indemnity Association Limited, The Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Steamship Mutual Underwriting Association (Bermuda) Limited, The Sunderland Steamship Protecting & Indemnity Association, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), insure more than 10,000 vessels totalling more than 200,000,000 gross registered tons. The associations insure for their members substantially all liability risks arising out of the operation of vessels in international maritime commerce. *See* Birch Reynardson, *The History and Development of P&I Insurance: The British Scene,* 43 Tul. L. Rev. 457 (1969).

Amici, together with their vessel owner and operator members and all other vessel owners and operators similarly situated, have a vital interest in the fair and just administration of the maritime law in the United States in the context of international commerce. In addition, *Amici* and their members are intimately involved in the multi-national nature of ocean borne commerce and have a vital interest in seeing that the international maritime law remains a harmonious and complementary body, without significant conflict among trading nations. As a consequence, *Amici* have a substantial interest in bringing to the attention of this Court their concern in this case, in which a fundamental and uniform principle of maritime law may be called into question *sub silentio* and eroded.

SUMMARY OF ARGUMENT

THE HISTORIC AND UNIFORM ADMIRALTY RULE OF DIVIDED DAMAGES, BASED UPON THE DUTY EACH SHIPOWNER OWES THE OTHER TO NAVIGATE SAFELY, REQUIRES ALL DAMAGES CONSEQUENT TO A VESSEL COLLISION TO BE AGGREGATED AND THEN APPORTIONED BETWEEN THE VESSEL OWNERS REGARDLESS OF THE LIABILITY OR NON-LIABILITY OF EITHER OF THE VESSEL OWNERS TO AN INDIVIDUAL PERSONAL INJURY OR PROPERTY DAMAGE CLAIMANT. THIS RULE SHOULD NOT BE AFFECTED OR CALLED INTO QUESTION BY ANY ACTION OF THE COURT IN THIS CASE.

Amici enter this case in order to examine and highlight the admiralty law of vessel collision damages and to distinguish that law from rules that may apply under the common law to third party suits for indemnity or contribution in personal injury cases involving workers' compensation statutes. *Amici* do not seek directly either affirmance or reversal of the decision below, and Amici take no position on the interpretation of the "exclusivity" provision of the Federal Employees Compensation Act, 5 U.S.C. §8116(c) (1976), as it applies to cases involving aircraft accidents. *Amici* seek, rather, to support and underscore a distinction asserted by the Respondent United States in its brief to the court of appeals and, we assume, to be asserted in its brief to be filed in this Court. *Amici* seek to point out to this Court the history, and the importance within the maritime law, of the uniform divided damages rule in vessel collision cases.

In its brief to the court of appeals and in its brief to this Court (Brief for Petitioner at 31-43, *Lockheed Aircraft Corp. v. United States*, No. 81-1181 (filed June 18, 1982)), Petitioner Lockheed asserts that this Court's decision in *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597 (1963), states a generally applicable common law rule of tort

indemnity. Before the court of appeals, Respondent United States distinguished *Weyerhaeuser* from the issues in this case on the grounds, *inter alia*, that *Weyerhaeuser* involved "the historic admiralty rule of divided damages" (Reply Brief for the Appellant at 11, *Thomas v. Lockheed Aircraft Corp.*, 665 F.2d 1330 (D.C. Cir. 1981)), and did not involve an issue of common law under the Federal Tort Claims Act (*Id.* at 13-14).

However, in deciding for the United States, the court below framed its ruling as dealing with:

> The conflict between doctrines governing third-party suits for contribution or indemnification and statutory exclusive remedy provisions of workmen's compensation laws. . . .

Thomas v. Lockheed Aircraft Corp., 665 F.2d. at 1331. The court of appeals did not recognize the distinction, urged by the United States, between the maritime collision law rule of damages and common law rules regarding contribution or indemnity. Instead the court articulated its decision as one choosing between the principles followed in:

1. cases in which the party seeking indemnity asserts against the employer of injured persons the breach of an independent duty, and

2. cases in which the party seeking indemnity is confronted with the contention that the party from whom indemnity is sought is shielded from the duty to indemnify by, *e.g.*, a workmen's compensation statute.

Whether or not this Court affirms the outcome of the case below, *Amici* believe it desirable for this Court to accept the distinction suggested by the United States and to recognize expressly the continued vitality of the admiralty rule of collision damages, as set out by this Court in *The Chattahoochee*, 173 U.S. 540 (1899), and *Weyerhaeuser, supra*, in maritime collision cases.

ARGUMENT

I. *Because The Admiralty Collision Damages Rule Is Based Upon The Duty Each Shipowner Owes The Other To Navigate Safely, Proportionate Division of All Damages Incurred Is Appropriate. Particular Duties A Shipowner Owes Third Persons Are Irrelevant.*

The divided damages rule, whereby all damages sustained in a collision are shared by the owners of the colliding vessels, is an ancient rule of virtually universal acceptance in maritime law. Although some aspects of the body of international maritime collision law are perhaps even more ancient than this precept,[1] the rule whereby all damages consequent to a collision are shared by the vessel owners was codified as early as 1150 A.D. in the Rolls of Oleron.[2] Article XIV of the Rolls deals with collision damages as follows:[3]

Art. XIV.

> If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize in each of the said ships damnified. *In this case the whole damage shall be in common, and be equally divided and appraised half by half*; and the master and mariners of the vessel that

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[1] *See generally* the excellent history of collision law, and compilation of sources, in Owen, *The Origins and Development of Marine Collision Law*, 51 Tul. L. Rev. 759 (1977), which traces collision law as far back as 300 B.C.

[2] The island of Oleron in the Bay of Biscay was part of the dowry of Eleanor of Aquitaine. When she divorced Louis VII of France and married Henry II of England, hegemony over Oleron passed to the latter. Her son, Richard I, had the Rolls published as part of English maritime law. The Rolls are a vital source of the international maritime law. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 401, n.3 (1975).

[3] The Rolls of Oleron are translated into English and reprinted in 30 F.Cas. 1171 (1897).

> struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or wilfully. The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.

30 F.Cas. at 1178 (emphasis added) (footnote omitted).

In England the rule of equally divided damages was followed for hundreds of years[4] until the Brussels Collision Convention,[5] which dictated proportionate allocation of damages according to fault, was ratified and made statutory law.[6] The maritime law in the United States developed along similar lines. Early approval of collision damage division in American cases was found in dicta in *Ralston v. The State Rights*, 20 F.Cas. 201 (E.D. Pa. 1836) (No. 11,540), and *Strout v. Foster*, 45 U.S. (1 How.) 89 (1843). In *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), this Court expressly approved the rule of equal division of damages in a mutual fault collision. At that time the moiety rule, providing for equal division regardless of degrees of fault, placed the United States in harmony with the major maritime powers. After the wide adoption of the 1910 Collision Convention, however, the United States found itself for a time out of step with other nations regarding the proportions in which collision damages were divided. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court brought the United States back into line by adopting the proportionate allocation of all damages according to fault.

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[4] *See Hay v. LeNeve*, 2 Shaw H. L. 395 (Scot. 1824), The *Woodrop-Sims*, 2 Dods. 83, 165 Eng. Rep. 1422 (Adm. 1815).

[5] International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Sept. 23, 1910, (hereinafter 1910 Collision Convention) *reprinted in* 6 *Benedict on Admiralty*, 3-11 to 3-14 (7th rev. ed. 1982).

[6] Maritime Conventions Act, 1911, 1 & 2 Geo. 5, ch. 57.

Ship collisions involve enormous dynamic forces; it is rare that a collision does not result in large damage to vessels and their cargo, along with injury and loss of life to persons aboard the vessels. The subsequent collision litigation "practically invariably"[7] involves actions by both shipowners, usually taking the form of consolidated actions by each shipowner to limit his liability under the Limitation of Liability Act.[8] That Act provides for a concursus of all claims, backed by an injunction,[9] the result of which is that all persons claiming damage consequent to a collision – to ship, cargo or person – are required to litigate their claims in the limitation action.[10]

So far as damages owed by a vessel owner to third parties are concerned, the maritime law does not distinguish between property damage and personal injuries, or between individuals covered by workers' compensation statutes and those not so covered. "Liabilities to third parties incurred in collision go into the final divided damages adjustment." Gilmore & Black, at 527. The applicable maritime rule has been enunciated as follows:

> Where two vessels collide due to the fault of both, it is *established admiralty doctrine* that the mutual wrongdoers shall share . . . the damages sustained by each, *as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin* and has been applied in many cases. . . .

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284 (1952) (emphasis added) (footnotes omitted).

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[7] G. Gilmore & C. Black, *The Law of Admiralty*, 498 (2d ed. 1975) (hereinafter Gilmore & Black).

[8] 46 U.S.C. §§181-189 (1976).

[9] 46 U.S.C. §185 (1976).

[10] *See generally* Admiralty Law Institute: *Symposium on Limitation of Liability*, 53 Tul. L. Rev. 999-1419 (1979).

The usual third party property claimant in collision cases is the owner of cargo. Under the doctrine of joint and several liability, the cargo owner may recover one hundred percent of his damages from the non-carrying vessel[11] if the latter is in any way at fault, regardless of the percentage of that fault. *The Atlas*, 93 U.S. 302 (1876); *The Juniata*, 93 U.S. 337 (1876). It is not unusual for cargo owners whose property is damaged in a collision to be denied recovery against the carrying vessel as a result of the provisions of the United States Carriage of Goods by Sea Act (COGSA)[12] or its predecessor, the Harter Act,[13] each of which exempts a vessel from liability to carried cargo if the cause of the collision was negligent navigation of the carrying vessel.[14] In such cases the non-carrying colliding vessel that has paid a cargo settlement or judgment has the right to include in its collision damage claim against the carrying vessel the sums paid for damage to cargo on the other vessel. *See Erie Railroad Co. v. Erie & Western Transportation Co.*, 204 U.S. 220, 226 (1907); *The Chattahoochee*, 173 U.S. 540 (1899); *Oliver J. Olson & Co. v. American Steamship Marine Leopard*, 356 F.2d 728, 737-39 (9th Cir. 1966); *United States v. Farr Sugar Corp.*, 191 F.2d 370 (2d Cir. 1951), *aff'd sub nom. United States v. Atlantic Mutual Insurance Co.*, 343 U.S. 236 (1952); *Complaint of Flota Mercante Grancolombiana, S.A.*, 440 F. Supp. 704, 725 (S.D.N.Y. 1977). The total collision damages are then allocated without regard for the COGSA or Harter Act immunity.

The rule regarding damages for personal injury is identical. In cases where the carrying vessel is exempt from suit by a seaman as a consequence of a provision of a workers' compensation statute, the injured seaman may nevertheless recover

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[11] We use "non-carrying vessel" to describe the ship involved in a collision which did not have on board the cargo or person whose claim is the subject of the damage dispute.

[12] 46 U.S.C. §§1300-1315 (1976).

[13] 46 U.S.C. §§190-196 (1976).

[14] 46 U.S.C. §1304 (1976); 46 U.S.C. §192 (1976).

one hundred percent of his damages from the non-carrying colliding vessel, and that other vessel may include such sums in its damage claim against the carrying vessel. *See Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597 (1963); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204 (5th Cir.), *cert. denied*, 393 U.S. 983 (1968).

While the legal obligations owed by the respective shipowners to categories of litigants may differ (*e.g.*, the non-carrying ship may be required to pay a cargo loss, while the carrying ship is immune) the maritime law has resisted every effort to parse and subdivide the mutual obligations owed by the shipowners between themselves. The manner in which damages are divided in maritime collision cases was set out in *The Sapphire*, 85 U.S. (18 Wall.) 51, 56 (1874), as follows:

> It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder.

The path that the maritime law has followed in the development of the rule is instructive. In *The North Star*, 106 U.S. 17 (1882), a shipowner whose vessel had sunk after a mutual fault collision (and who was entitled to limitation), argued that it should be allowed to recover one-half of its damages although it would owe nothing to the other vessel. That theory was premised upon analyzing the obligations owed by each shipowner to the other as separate and subject to different defenses. It was argued that the owner of the sunken vessel was obligated to pay one-half of the other vessel's damage, which obligation was discharged by operation of the Limitation Act (the sunken vessel being worth nothing after the collision), leaving intact the assertedly separate obligation of the other vessel owner to pay one-half of the value of the vessel as she had been before the collision. Characterizing that argument as "startling," the Court rejected it:

> It would enable the owners of the Ella Warley [the sunken vessel] to obtain full compensation for a moiety of their loss, while the owners of the North Star would have

> to sustain both their own entire loss and half of that of the owners of the Ella Warley, while both vessels were alike to blame for the collision. A rule which leads to such results cannot be a sound one.

Id. at 28. *See also The Manitoba,* 122 U.S. 97 (1887).

In *The Chattahoochee,* 173 U.S. 540 (1899), the Court had occasion to pass on the effect of the divided damages rule in a collision case in which one of the vessels was statutorily immune from liability to a party whose damages formed a part of the claim by the *other* vessel. After a collision between the schooner GOLDEN RULE and the steamship CHATTAHOOCHEE, the owners of cargo carried aboard the GOLDEN RULE recovered their entire damages against the CHATTAHOOCHEE, the GOLDEN RULE being immune to liability for damages to its cargo as a consequence of the Harter Act, Ch. 105, §3, 27 Stat. 445 (1893) (current version at 46 U.S.C. §192 (1976)). The sum thus paid to cargo was allowed as a proper element of the CHATTAHOOCHEE's damage claim against the GOLDEN RULE, and the latter appealed, complaining of "indirect" liability and suggesting that the damage elements be analyzed separately. Rejecting this argument, the Court relied on *The North Star,* among other cases, for the proposition that *all* collision damages are added together in a "common mass" before being divided:

> If the Harter Act was not intended to increase the liability of one vessel towards the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this Act, notwithstanding one or both of such vessels be laden with a cargo.

The Chattahoochee, 173 U.S. at 555.

The collision damage rule was examined again in a personal injury context in *Weyerhaeuser Steamship Co. v. United States,* 372 U.S. 597 (1963). After a mutual fault collision between the S/S E.E. WEYERHAEUSER and the army dredge PACIFIC, the vessel owners litigated the issues on a libel and a cross libel under the Public Vessels Act, 46 U.S.C.

§§781-790 (1976). The owners of the WEYERHAEUSER settled a personal injury claim made by a civilian government seaman serving aboard the dredge and included that settlement sum in their damage claim against the United States. The Ninth Circuit held that the exclusivity provision of the Federal Employees Compensation Act[15] rendered the settlement sum an improper element of damages, and Weyerhaeuser appealed. The United States argued to this Court that the F.E.C.A. provided an "upper limit" on the liability of the United States to an injured federal employee (Brief for the United States at 11-17, *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597 (1963)) and framed its argument in terms of the rights of "third parties" against the United States in an action for "contribution" (*Id.* at 17-24). This Court disagreed and unanimously reversed. Rejecting the "contribution" analysis, the Court analyzed the issue as being a question of the "correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault," 372 U.S. at 603, holding that the settled collision damages rule must prevail over the allegedly contrary policy implied in the exclusivity provision of the F.E.C.A.

Lockheed has expended considerable scholarship and ingenuity on the question of whether Lockheed's claim for "indemnity" in this case is "derivative" of the claim of Ms. Bottorff's estate, or whether the causes of action asserted by Lockheed against the United States are based on "independent" duties. *Amici* propose no answer to that question under whatever substantive law applies to the action between Lockheed and the United States. *Amici* seek only to have this Court recognize that under the uniform admiralty law the "correlative rights and duties of two shipowners," are indeed "independent" of any obligations owed to persons or cargo on board either vessel and rely not at all on any analysis of

[15]5 U.S.C. §757(b) (1958) (current version at 5 U.S.C. §8116(c) (1976)).

whether either or both shipowners are "joint tort feasors" in respect of such person or cargo. *Weyerhaeuser*, 372 U.S. at 603. Stated another way, the cause of action being litigated by the vessel owners is the collision, and not either contribution or indemnity. As a consequence, this Court's ultimate disposition of Lockheed's claim should not affect the continued validity of the uniform admiralty collision law.

II. *There Is No Common Law Of Collision, And Common Law Principles Are Irrelevant To A Collision Case.*

The admiralty rule of allocating all collision damages between the responsible vessels was a well settled doctrine in admiralty law when the maritime law was "federalized" with the adoption of the Constitution. Nothing in the common law, then or now, had or has any bearing on the maritime law to be applied in collision cases. There was and is no common law of ship collision. The general maritime law has origins different from the common law and historically has had a separate growth and evolution in the United States.

The admiralty and maritime law is recognized expressly, but not otherwise defined, in Article III, Section 2, Clause 1 of the Constitution. In the Judiciary Act of 1789, Congress provided for admiralty actions when it established the federal court system.

> Sandwiched between the specification regarding criminal causes and the civil pleas just mentioned was *the real meat of the District Court's jurisdiction*—the exclusive original cognizance of *'all civil causes of admiralty and maritime jurisdiction'*—something that antifederalists generally had conceded was properly federal.

J. Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, 473-74 (1971) (emphasis added). The 1789 statutory language has been carried down through the years and remains essentially unchanged.[16]

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[16] 28 U.S.C. §1333 (1976).

The admiralty and maritime jurisdiction clause has long been construed as mandating uniform substantive maritime law where appropriate.

> One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed. . . .

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). *See also Foremost Insurance Co. v. Richardson*, ____ U.S. ____, 102 S. Ct. 2654 (1982); *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-742 (1961). That uniformity is especially necessary in the case of collision of vessels engaged in international navigation.

Just as the rule of dividing collision damages was settled in the maritime law long before the Constitution was adopted, it was equally settled in the common law that contribution among tort feasors, which could yield results mathematically similar to division of damages in collision cases, was prohibited. *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); Gregory, *Contribution Among Joint Tort Feasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941). In a large number of American states, contribution in common law tort cases was eventually adopted by statute. The statutory rules governing causes of action, parties and the methods of apportioning damage diverge widely. W. Prosser, *Law of Torts*, 307-10 (4th ed. 1971).

That the substantive maritime law differs in many of its rules from the common law is true, but that remains only an observation, not an argument. There are many differences between common law and maritime law, and this Court has never sought to homogenize the two systems.[17] In *Moragne v.*

[17]Even within maritime law, collision law is *sui generis*, and damages in collision cases are not necessarily the same as in non-collision cases. *See Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra*, 342 U.S. at 284.

States Marine Lines, Inc., 398 U.S. 375 (1970), this Court overturned *The Harrisburg*, 119 U.S. 199 (1886), which had held that the maritime law did not recognize an action for wrongful death. *The Harrisburg* had relied on common law precedent and, according to Justice Harlan writing for a unanimous Court in *Moragne*, had been poorly researched as respects maritime law:

> [I]t is not apparent why the Court in *The Harrisburg* concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law.

398 U.S. at 386-87 (footnote omitted).

The common law recognizes no causes of action such as general average, maritime liens, limitation of liability, maintenance and cure, unseaworthiness, or salvage, all of which are garden variety cases in the admiralty law. *Amici* suggest, therefore, that the uniform rule respecting vessel collision damages, wherein the damages that flow from a collision must be aggregated and apportioned between the vessels at fault regardless of the non-liability of one ship to a particular claimant or class of claimant, must remain untouched in the admiralty sphere. The Court's action in this case should make clear that no attack by inference on that settled maritime rule is warranted.

III. *The Lower Courts Have Consistently Understood The Application Of The Divided Damages Rule In Its Maritime Context.*

The application of the divided damages rule in admiralty collision cases has given the lower courts no difficulty.[18] In those instances in which lower courts have declined to extend

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[18]*See* Admiralty Law Institute: *Symposium on American Law of Collision*, 51 Tul. L. Rev. 759-1216 (1977).

the rule to non-maritime actions, or declined to apply the maritime rule by analogy to so-called "derivative" actions, those courts similarly have had no difficulty distinguishing the admiralty law or recognizing the continuing vitality of the collision damages rule in its proper maritime sphere.

In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied sub nom. United Air Lines v. United States*, 379 U.S. 951 (1964), the court relied on the exclusivity provision of the F.E.C.A.[19] and upon *Feres v. United States*, 340 U.S. 135 (1950) (holding that service personnel cannot sue the United States under the Federal Tort Claims Act), to bar a suit by United Air Lines against the United States for indemnity in respect of wrongful death actions brought against the airline by both civilian and military government employees. In *Wiener* the court distinguished *Weyerhaeuser* as follows:

> The Supreme Court in Weyerhaeuser . . . held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured.

335 F.2d at 402-03 (footnote omitted). Similarly, in *Nutt v. Loomis Hydraulic Testing Co.*, 552 F.2d 1126 (5th Cir. 1977), the Fifth Circuit resisted the attempt to impose state law rules of employer-employee and third party liability upon the parties in a maritime law collision case:

> Under these circumstances, we do not consider ourselves bound to apply a rule of contribution – indemnity born and nurtured in a non-collision, non-maritime fact situation to that of a collision of two vessels. . . .

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[19] 5 U.S.C. §757(b) (1958) (current version at 5 U.S.C. §8116(c) (1976).

Id. at 1132 (footnote omitted). *See also Newport Air Park, Inc. v. United States,* 419 F.2d 342 (1st Cir. 1969).

Even the cases in which the lower courts have expressed some uncertainty as to the scope of *Weyerhaeuser* have, without exception, recognized *Weyerhaeuser's* maritime lineage and its proper application within the maritime collision context.[20]

These cases all demonstrate the continuing vitality of the distinction between maritime collision law and common law contribution or indemnity. If this Court denies Lockheed's claims against the United States as a consequence either of the legal relationship between the United States and its employees under the compensation statute or of the nature of Lockheed's action against the United States as "derivative" rather than "independent," then *Amici* request that the distinction historically made by this Court and the lower courts, between the rules of admiralty collision law and the rules governing other cases, be clearly and expressly adhered to in this case.

CONCLUSION

However this Court deals with the issues arising from the multiple deaths aboard the C-5A in Vietnam in April of 1975,

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[20]*See Galimi v. Jetco, Inc.,* 514 F.2d 949 (2d Cir. 1975); *Travelers Insurance Co. v. United States,* 493 F.2d 881 (3rd Cir. 1974); *Wallenius Bremen G.m.b.H. v. United States,* 409 F.2d 994 (4th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970); *Empire Seafoods, Inc. v. Anderson,* 398 F.2d 204 (5th Cir.), *cert. denied,* 393 U.S. 983 (1968).

Amici request this Court to make clear in its decision the continued vitality of the admiralty collision damages law in cases involving ship collisions.

Respectfully submitted,

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Docket Sheet

NO. 81-1181-CFX	TITLE	Lockheed Aircraft Corporation, Petitioner v. United States, et al.

DOCKETED	COURT
Dec. 23, 1981	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Carroll E. Dubuc, Richard M. Sharp
	Counsel for Respondents: Solicitor General
Dec. 23, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 20, 1982	Order extending time to file a response to the petition until Feb. 22, 1982.
Feb. 22, 1982	Brief for the U. S. in opposition filed.
Feb. 24, 1982	DISTRIBUTED. 3-19.
Mar. 2, 1982	Reply brief for the petitioner filed. (D).
Mar. 23, 1982	REDISTRIBUTED. 3-26.
Mar. 30, 1982	REDISTRIBUTED. 4-2.
Apr. 5, 1982	Petition GRANTED.

Apr. 30, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until June 19, 1982.
June 18, 1982	Joint appendix filed.
June 18, 1982	Brief for the petitioner filed.
July 15, 1982	Order extending time to file the respondents' brief on the merits until Aug. 18, 1982.
Aug. 18, 1982	Brief, amici curiae The Britannia Steam Ship Insurance, et al. filed.
Aug. 20, 1982	Order further extending time to file the respondents' brief on the merits until August 27, 1982.
Aug. 27, 1982	Brief for the United States filed.
Sept. 15, 1982	CIRCULATED.
Nov. 4, 1982	Reply brief for the petitioner filed. (D).
Nov. 30, 1982	ARGUED.